92-2059

No. _____

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In The

Supreme Court of the United States

October Term, 1993

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JACK GERRITSEN,

Petitioner,

v.

CONSULADO GENERAL DE MEXICO, et al.,

Respondents.

♦♦♦♦♦♦♦♦♦♦♦♦♦♦♦♦♦♦

Petition for Writ of Certiorari
to the
United States Court of Appeals
for the Ninth Circuit

Appendix

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QUESTIONS PRESENTED

1. Whether a single incident of unconstitutional activity is sufficient to impose liability or does liability require proof that there existed an underlying unconstitutional policy?

2. Whether immunity attaches to private acts of foreign sovereign agents to protect the dignity and premises of a foreign consulate by placing petitioner under arrest and imprisonment to prevent the passing of anti-government leaflets in the proximity of the consulate?

3. Whether service on a consulate, an agency or instrumentality of a foreign state requires a copy of a translation into the official language of that foreign state?

PARTIES TO THE PROCEEDINGS

The petitioner is Jack Gerritsen.

The respondents are:

Consulado General de Mexico,
Javier Escobar y Cordova, Consul General of the United Mexican States,
Agustin Garcia Lopez Santaolalla, Consul General of the United Mexican States,
Enrique Silva Guzman, Consul of the United Mexican States,
Salvador Uribe, Consular employee of the United Mexican States,
United States Federal Bureau of Investigation, and
F.B.I. Agent Carlos Berrios.

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Petition for Writ of Certiorari
to the
United States Court of Appeals
for the Ninth Circuit

The petitioner, Jack Gerritsen, respectfully prays that a writ of certiorari issue to review the March 30, 1993 judgment and opinion of the United States Court of Appeal to the Ninth Circuit affirming the District Court.

Opinions Below

The opinion of the Court of Appeals for the Ninth Circuit entered on 30 March 1993 is reported at *Gerritsen*

v. Consulado General de Mexico, 989 F.2d 340 (9th Cir. 1993) (*Gerritsen II*) and is reprinted in the appendix hereto at p.1 infra.

A Memorandum of Decision and Order of the United States District Court, Pamela A. Rymer, Judge, entered on 27 December 1989 in favor of defendant Carlos Berrios which were not reported but is reprinted in the appendix hereto at p. 17 *infra*.

A Memorandum of Decision and Order of the United States District Court for the Central District of California, Pamela A. Rymer, Judge, 21 September 1988 was reported at *Gerritsen v. Escobar y Cordova*, 721 F.Supp. 253 (C.D. Cal 1988) and is reprinted in the appendix hereto at p. 40 *infra*.

The opinion of the Court of Appeals for the Ninth Circuit entered on 8 January 1987 is reported at *Gerritsen v. Miguel de la Madrid Hurtado, etc., et al.*, 819 F.2d 1511 (9th Cir. 1987) (*Gerritsen I*) and reprinted in the appendix hereto at p. 49 *infra*.

Jurisdiction

Petitioner invoked federal jurisdiction under the First and Fourteenth Amendments to the United States Constitution and federal statutes 28 U.S.C. § 1330 (actions against foreign states), 28 U.S.C. § 1351 (actions against consuls and vice consuls), and 42 U.S.C. § 1983 (civil action for deprivation of rights) .

The Court of Appeals for the Ninth Circuit affirmed the District Court dismissal of respondents on

30 March 1993. No petition for rehearing was sought.

Jurisdiction to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

The constitutional provisions involved in this case are the First and Fourteenth Amendments and Article III, Section 2(2) of the Constitution of the United States. Statutory provision involved are 28 U.S.C § 1330, 28 U.S.C. § 1351, 28 U.S.C. § 1608 and 42 U.S.C. § 1983. See appendix p. 68 *infra*.

Statement of the Case

On 28 June 1983 petitioner, Jack Gerritsen ("Gerritsen"), was handcuffed by a private security guard while passing leaflets critical of the government of Mexico in El Pueblo Park. He had been warned by the guard on two occasions that such passing of leaflets was not allowed. Petitioner was then forced onto the premises of the Consulate of Mexico, respondent Consulado General de Mexico ("CGDM").

The security guard and respondent Salvador Uribe ("Uribe"), an employee of CGDM, and another person then forced petitioner in handcuffs into a room where he was beaten and struck several times and held prisoner for about two hours during which time he was interrogated by the Consul of Mexico in charge of affairs on that date, respondent Enrique Silva Guzman, and threatened with abduction into Mexico and torture. Two Los Angeles

police officers came into the premises of CGDM and removed one set of handcuffs and escorted petitioner out of CGDM and then removed another set of handcuffs and released petitioner.

When petitioner returned to the park to pass leaflets on 5 August 1983 he was pushed and kicked by respondent Uribe. On 20 September 1983 respondent Javier Escobar y Cordoba, Consul General of Mexico on that date, as petitioner was passing leaflets in the park restrained him and placed him under arrest and detained petitioner until the arrival of Los Angeles police officers who took petitioner. Petitioner remained in custody until he was able to post bail.

On 25 October 1983 petitioner was again physically attacked by respondent Uribe in the park to prevent the passing of leaflets.

On 18 June 1984 while petitioner was attempting to pass leaflets in the park respondent Uribe attacked petitioner and tore his shirt and broke his glasses.

On 31 July 1984, at 9:20 a.m. respondent Consul General of Mexico Escobar y Cordoba again restrained petitioner and placed him under citizen's arrest, as petitioner was passing leaflets in the park.

On 14 September 1984 petitioner was handcuffed by a security officer in the park to prevent the passing of leaflets in the park.

On 20 June 1985, as petitioner was passing leaflets in the park respondent Uribe removed a pistol

from a holster and from a distance of about twelve feet pointed said pistol at petitioner.

On 17 July 1985, as petitioner was attempting to pass leaflets in the park, Uribe struck him.

On 19 July 1985, Uribe again struck petitioner as petitioner passed leaflets out in the park.

On 20 July 1985, Uribe struck petitioner with a piece of metal.

On 26 July 1985, Uribe smashed the right foot of petitioner with Uribe's booted left foot.

On 30 July 1985 petitioner filed suit in the United States District Court, Central District of California, captioned a "COMPLAINT FOR DEPRIVATION OF FREE SPEECH AND PRESS, CONSPIRACY, INJUNCTIVE RELIEF, DECLARATORY JUDGMENT, FALSE IMPRISONMENT AND DAMAGES.

Service of the Summons and Complaint was perfected on CGDM by leaving copies with: Enrique Silva Guzman, a Consul of the United Mexican States, at the office of CGDM at 125 Paseo de la Plaza, Biscailuz Bldg., Los Angeles, CA 90012, on 5 August 1985 at 1:45 p.m. and by mail to the same address.

Service on Enrique Silva Guzman was in person at the same time and place.

Service on Javier Escobar y Cordoba was made in person on 12 August 1985 at 10:10 a.m. at the

Mexican Consulate, 1330 Front Street, San Diego, California 92101.

Service on Salvador Uribe was perfected on 7 August 1985 at the offices of CGDM, 125 Paseo de la Plaza, Biscailuz Bldg., Los Angeles, CA 90012 by handing copies to Enrique Silva Guzman, a Consul of the United Mexican States, a "COMPETENT ADULT WHO APPARENTLY IS IN CHARGE AT PLACE OF BUSINESS OF DEFENDANT," and by mail to the same address.

Service on Agustin Garcia Lopez Santaolalla was perfected on 5 August 1985 by handing copies to Enrique Silva Guzman, a "COMPETENT ADULT WHO APPARENTLY IS IN CHARGE AT PLACE OF BUSINESS OF DEFENDANT" at the offices of CGDM in Los Angeles, and by mail to the same address.

The District Court, Pamela A. Rymer, Judge, dismissed the complaint against all respondents for lack of subject matter jurisdiction.

The United States Court of Appeals for the Ninth Circuit reversed and remanded with instructions that the petitioner was allowed to amend his complaint. The decision was reported, *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511 (9th Cir. 1987), and is reprinted in the appendix hereto at p.49 *infra*.

A "Complaint 2nd Amended" was filed on 23 December 1987 captioned "FOR DEPRIVATION OF SPEECH AND PRESS, ASSAULT WITH A DEADLY WEAPON, BATTERY, FALSE IMPRISONMENT,

KIDNAPPING, INTENTIONAL INFLICTION OF PHYSICAL AND EMOTIONAL TRAUMA, THEFT, DESTRUCTION OF PROPERTY, FALSE ARREST, AND DAMAGES IN AN INTERNATIONAL CONSPIRACY," which named additional defendants including U.S.A., F.B.I. and F.B.I. Agents Snyder and Berrios, and alleged additional acts perpetrated to prevent the passing of leaflets by petitioner in the park.

On 11 August 1983 the City of Los Angeles enacted a policy which forbid the distribution of leaflets within blue lines drawn on the ground around the premises of CGDM, and required a permit to be obtained to pass leaflets outside those blue lines, and denied such permits on various occasions.

On 16 August 1983 F.B.I. Agent Snyder and respondent F.B.I. Agent Carlos Berrios escorted respondent into the offices of CGDM and informed him that he had violated federal law 18 U.S.C. § 112(b) which forbids him from coming within 100 feet of the consulate, and that they could arrest him at any time, and that this time was a warning, but he would be arrested on those charges if he should ever come within 100 feet of the offices of CGDM again.

In the month of November 1983, a report was filed internally within the offices of the F.B.I. which stated that on "August 16, 1983 Mr. Jack Gerritsen . . . was interviewed regarding Mr. Gerritsen's interference with the normal functions of the Mexican Consulate located at 125 Paseo de la Plaza, Los Angeles, California" and that "Mr. Gerritsen was told that if he desired to demonstrate against the Mexican Government

in accordance with his First Amendment rights, he must do so within the constraints of the PFO Statute, which explicitly restricts demonstrations to at least 100 feet from the structure housing the Consulate." A copy of that report was attached to petitioner's Opposition to Motion for Summary Judgment, re Defendant Carlos Berrios, filed May 4, 1988. See appendix p. 40.

On 19 December 1985 as petitioner was passing leaflets in the park respondent Uribe attacked him with two lengths of chain, causing petitioner to bleed from a cut over his left eyebrow.

On 21 September 1988 the United States District Court, Pamela A. Rymer, United States Circuit Judge, on a Motion for Summary Judgment, dismissed respondents Consulado General de Mexico, Garcia and Uribe for defective service of the Summons and Complaint and dismissed respondents Escobar y Cordova and Silva as being immune under the Vienna Convention on Consular Relations [*Vienna Convention on Consular Relations*, April 24, 1963, 21 U.S.T. 77, T.I.A.S. 6820, 596 U.N.T.S. 291] in that the alleged acts against them were in the exercise of an official function to protect the consulate. The decision, *Gerritsen v. Escobar y Cordova*, was reported at 721 F.Supp. 253 (C.D. Cal. 1988) and is reprinted in the Appendix hereto at p. 24 *infra*.

On 12 December 1989 the United States District Court, Pamela A. Rymer, United States Circuit Judge, in a Memorandum of Decision and Order, granted judgment in favor of respondent Carlos Berrios on a Motion for Summary Judgment on the grounds that the statute of limitations bars the action. The decision was not reported

but is reprinted in the Appendix herein at p.17 *infra*.

Upon the appointment of United States Circuit Judge Pamela A. Rymer to the Ninth Circuit Court of Appeals, the case was transferred to Judge Terry J. Hatter.

After several setting and resetting of trial dates the remaining parties reached a settlement. Upon final dismissal of all remaining parties a timely Notice of Appeal was filed.

On 30 March 1991 the United States Court of Appeals for the Ninth Circuit affirmed the District Court in all respects. The decision was reported, *Gerritsen v. Consulado General de Mexico*, 989 F.2d 340 (9th Cir. 1993) and is reprinted in the Appendix herein at p. 1 *infra*.

An Urgent Question of Law

The human, civil, and constitutional right to communicate a political message in public by the use of words is a fundamental right. It is absolutely essential to the preservation of all other rights and privileges. Gerritsen has alleged that beginning in 1983 the civil and police power of two nations have been brought to bear in a course of conduct of intimidation and physical abuse in order to deprive him of that right, the right of all persons to speak in a public park.

The response of the courts below has been a variety of rulings, decisions and judgments that are in conflict with themselves, with other district courts, in conflict with other circuit courts and in conflict with decisions of this Court.

In this First Amendment case this Court should exercise strict scrutiny and require that inferior courts do the same so as to preserve the communication rights of all persons and to allow for a remedy at law. Intimidation and violence by persons in authority must not be permitted to prevail over and prohibit the use of words. This Court of last resort must protect a right that so many Americans have sacrificed so much for and allow itself a hearing on the merits of this case by granting this petition for writ of certiorari.

Reasons for Granting the Writ

I. The Circuits are in direct conflict on whether liability attaches to a single incident of unconstitutional activity or whether an underlying unconstitutional policy must be proven.

This case presents a unique opportunity to settle a dispute between the Circuits on an important issue of constitutional law that has divided the Circuits.

This case allows the Court to clearly decide the issue of actionable policy as opposed to a single act as this case is not cluttered with any factual issues that would distinguish the single act from the policy. The policy consists of a single act replicated.

In *CISPES v. F.B.I.*, 770 F.2d 468 (1955) the Fifth Circuit found for the defendants F.B.I., in that CISPES had alleged only a single unconstitutional act. On 22 July 1982 F.B.I. agents deprived persons of the right to peaceably protest within 100 feet of the foreign consulate of Honduras within the Fifth Circuit. The agents did so by approaching the protesters and telling them that they were violating 18 U.S.C. § 112 by virtue of their activities. The Circuit court found in a lack of evidence to support the conclusion that the statute would be unconstitutionally applied in the future and ruled for the defendants.

Petitioner in this case has alleged identical facts in his complaint against F.B.I. agents.

Just thirteen months after F.B.I. agents had

informed persons in the Fifth Circuit that they were in violation of 18 U.S.C. § 112(b) by protesting within 100 feet of a consulate in New Orleans, F.B.I. agents Snyder and Berrios approached this petitioner on 16 August 1983 and deprived him of First Amendment rights by informing him that, " . . . he has violated law 18 U.S.C. § 112(b) which forbids him to come within 100 feet of the Mexican Consulate, and could arrest him at any time, and that this was only a warning, and that he will be arrested on those federal charges if he should come within 100 feet of the building." (2nd Amended Complaint, Docket No. 63, excerpts at pp. 18-19.)

The only significant distinction between the two cases is that in the Fifth Circuit the agents were alleged to have acted only against those plaintiffs and there was no support for any conclusion that the statute would ever be applied in the future to prevent protesters from coming within 100 feet of a foreign consulate.

In this instant case petitioner, based upon F.B.I. acts in the Ninth Circuit, can and has alleged a policy of F.B.I. agents depriving persons of communication rights within 100 feet of a foreign consulate.

This court in *United States v. Grace*, 461 U.S. § 171, 176, 103 S.Ct. 1702, 1707, 75 L.Ed.2d 735 (1983) citing *Carey v. Brown*, 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2nd 263 (1980) stated:

> "There is no doubt that as a general matter peaceful picketing and leafletting are expressive activities involving speech protected by the First Amendment."

In *CISPES v. F.B.I., supra*, the court cited the above quotation from *Grace* and then immediately followed at page 473 with:

> "We are unconvinced, however, that the statute here was intended to, or will in the future, be read as prohibiting such protected expression."

It is now clear that F.B.I. have continued to use the threat of arrest to chill and prohibit the exercise of First Amendment activities within 100 feet of consulates, and do so with respect to this petitioner and can and will continue to do so whenever anyone so comes within 100 feet of a consulate. The evidence of *CISPES* and this petitioner in Los Angeles now constitutes a clear unconstitutional F.B.I. policy.

The two cases differ only in that a single unconstitutional act occurred in the Fifth Circuit whereas there existed an unconstitutional policy in the Ninth Circuit. In this instant case *CISPES* was cited in the District Court in support of petitioner's allegation of an unconstitutional policy. (See Plaintiff's Opposition to Motion for Summary Judgment, Appendix p.43.)

If an unconstitutional policy must have been alleged under *CISPES* in the Ninth Circuit, then petitioner could not have alleged it until such time as when the *CISPES* decision was rendered in the Fifth Circuit on 9 September 1985. If, however, a single act is sufficient to indicate a policy in deprivation of a right, then petitioner could have and should have--but did not--alleged it within the four year statute of limitations period for a *Bivens*

action [*Bivens v. Six Unknown Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d (1971)] against federal agents.

Petitioner's allegations of an unconstitutional policy were precluded by the District Court and the Ninth Circuit court below in affirming the District Court's finding that there was no equitable tolling of the statute of limitations period based upon petitioner's claim that the *CISPES* decision was law, that a liability may be had only when there is a showing that the statute has been used more than once in an unconstitutional policy to deprive persons picketing or leafletting of their First Amendment rights.

Not only are the Circuits divided on the issue of what is sufficient evidence of a policy, at least one Circuit has pleaded for clarification by this Court by noting that this Court is deeply divided on the issue. In *Tanner v. Heise*, 879 F.2nd 572, 581 (9th Cir. 1989) the court found that the District Court had erred in its characterization of this Court's opinion in *Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985), when it concluded from *Tuttle* " . . . that the Supreme Court had 'made clear' that a single incident of unconstitutional activity is not sufficient to impose liability . . . unless proof of that incident demonstrates that it was caused by an underlying unconstitutional policy . . ."

The Ninth Circuit in the same footnote then points to a subsequent case, *Pembaur v. City of Cincinnatti*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986), as indicating that this Court:

> " . . . unable to achieve a majority position either approving or disproving this language. *See Id.*, at 482 n. 11, 106 S.Ct. at 1299 n.11 (plurality portion of opinion); *id.* at 487, 106 S.Ct. at 1302 (Stevens, J., concurring in part and concurring in the judgment); *id.* at 499 106 S.Ct. at 1308 (Powell, J., dissenting)."

The *Tanner v. Heise, supra*, court went further and emphasized that even this Court has recognized in the decision in *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 1203 and n.4, 103 L.Ed.2d 412 (1989) that this Court is "deeply divided."

This Court appears to be deeply divided in a series of cases that have followed *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), including *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988), *Oklahoma City v. Tuttle, supra, Springdale v Kibbe*, 480 U.S. 257, 107 S.Ct. 1114, 94 L.Ed.2d 293 (1987), and *Los Angeles v. Heller*, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986).

In the *City of Canton, supra*, 109 S.Ct. 1205, this Court brought to bear such standards as "deliberate indifference to the rights of its inhabitants," from *Monell, supra*. In *Pembaur v. Cincinnati*, 475 U.S. 469, 483-484, 106 S.Ct. 1292, 1300-1301, 89 L.Ed.2d 452 (1986) (plurality) states:

> " . . . liability attaches where--and only where--a deliberate choice to follow a

> course of action is made from among various alternatives by city policymakers."

Applying any of those standards petitioner here could not have alleged an unconstitutional policy by F.B.I. agents to threaten to arrest persons demonstrating or leafletting within 100 feet of a consulate based upon his own one time experience.

However, upon the rendering of the *CISPES* decision, policy and customs of F.B.I. agents are implicated when the unconstitutional act is repeated. The court in *CISPES* was in error in concluding that in the future the § 112(b) statute would be used to prohibit protected expression. The courts below in this case have incorrectly concluded that petitioner's allegation of an unconstitutional policy should have and could have been alleged prior to the *CISPES* decision ruling that a one time unconstitutional act by agents is not actionable.

Petitioner did not and does not challenge the constitutionality of 28 U.S.C. § 112. None of the parties in this case have ever suggested that *CISPES* is in error and none of the courts in this case have ruled the *CISPES* decision erroneous.

This Court should clarify the standards for determining when an unconstitutional policy or custom is actionable, and this case with its clear distinction between a one time act and now at least two acts is a proper fact situation which can be used to clarify and distinguish what is an unconstitutional policy of a law enforcement agency, and what is not actionable as a one time error or mistake of judgment and not indicative of policy.

A decision by this court requiring proof of a policy by more than a single incident tolls the statute of limitations period for this petitioner until the *CISPES* decision, allowing reversal of the dismissal for failure to file a timely complaint alleging an unconstitutional policy by F.B.I. agents.

II. There is a conflict between the Circuits as to whether private acts of foreign sovereigns are immune from jurisdiction of U.S. courts.

The District Court, in its ruling dismissing respondents Escobar and Silva found that they had immunity as consular officials from suit pursuant to the *Vienna Convention on Consular Relations*, April 24, 1963, 21 U.S.T. 77, T.I.A.S. 6820, 596 U.N.T.S. 291. See appendix p.36.

The District Court did recognize that the nature of the allegations included "physical encounters" (see appendix p.39) and that on 20 September 1983 "defendant Escobar "place plaintiff under citizen's arrest and restrained plaintiff until Los Angeles police arrived to take plaintiff into custody. SAC ¶ 36." (See appendix at p. 27.)

The Ninth Circuit also recognized the physical nature of the allegation within its decision:

> " . . . placed him under citizen's arrest in the consulate (until LAPD officers arrived to take Gerritsen into custody for

disturbing the peace)"

See appendix p. 11.)

However, the U.S. Court of Appeals for the Seventh Circuit has discussed immunity under the F.S.I.A. and has concluded in *Rush-Prebyterian-St.Luke's Center v. Hellenic Rep.*, 877 F.2d 574, 578 (7th Cir. 1989) that immunity attaches only:

> " . . . if no private party could have engaged in challenged conduct, . . ."

On the same page, within footnote 4, the *Rush-Presbyterian* court cited *Letelier v. Republic of Chile*, 748 F.2d 790, 797 (1984) *cert. denied*, 471 U.S. 1125, 105 S.Ct. 2656, 86 L.Ed.2d 273 (1985) indicating that the Second Circuit had approved of the "private person" test.

Also, the U.S. Court of Appeals for the Seventh Circuit in *Segni v. Commercial Officer of Spain*, 835 F.2d 160, 164 (7th Cir. 1987) cites a Second Circuit case with approval of the ruling within *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 309 (2nd Cir. 1981) stating that:

> "("If the activity is one in which a private person could engage, it is not entitled to immunity.")" *cert. denied*, 454 U.S. 1148, 102 S.Ct. 1012, 71 L.Ed.2d 301 (1982).

The U.S. Court of Appeals for the Sixth Circuit in *Gould, Inc. v. Pechiney Ugine Kuhlman*, 853 F.2d 445, 449 (6th Cir. 1988) also found that:

> "Jurisdiction immunity of a foreign state is restricted to suits involving its public acts, and does not extend to commercial or private acts. *McKed v. Islamic Republic of Iran*, 722 F.2d 582 (9th Cir. 1983) *cert. denied*, 469 U.S. 880, 105 S.Ct. 243, 83 L.Ed2d 182 (1984)."

The Ninth Circuit's affirmation of the District Court's finding of immunity also appears to contradict a prior finding by the Ninth Circuit in this case that there is no immunity for these defendants for the acts alleged against them.

Within *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1516 (9th Cir. 1987), Harry Pregerson, Judge, writing without dissent, found that after examination of the *Vienna Convention, supra*:

> "Wrongful acts committed by an official or employee of a Mexican consulate within the United States to suppress criticism of Mexico within this country constitute an interference with United States internal affairs because these acts impair the citizenry's ability to promote self government through robust discourse concerning issues of public import. Therefore the acts of two consuls general and the vice consul alleged in the complaint are not "within the limits permitted by international law" and thus are not consular functions as defined in Article 5(a)."

Regarding this petitioner's allegations at that time against consular employees, that court concludes at p. 1517 that:

> "Assault with a deadly weapon and kidnapping, for instance, are not consistent with penal laws applicable in the United States. These acts are, therefore, "prohibited by the laws and regulations of the receiving state," and thus cannot constitute consular functions under Article 5(a).

Subsequent to those rulings in *Gerritsen I* on remand the District again found immunity pursuant to the *Vienna Convention, supra*, on a basis that:

> "Because the record has been narrowed since the Ninth Circuit decision, the immunity issue must be reexamined in light of the record as it now appears."

(See Appendix p. 37.)

However, on the second appeal on the issue of immunity the Circuit Court of Appeals found just the opposite, that:

> "Despite orders from the district court to specify and elaborate upon these allegations and interrogatories from the defendants, Gerritsen never provided more detailed information. On this limited evidentiary basis, the district court

> concluded that Escobar and Silva were immune from suit under the Vienna Convention."

Appendix p. 11.

Respondents Escobar and Silva of *Gerritsen I* are the same individuals in *Gerritsen II*. Therefore not only are the Circuit Courts in conflict on immunity for individual acts under jurisdiction of the *Foreign Sovereign Immunities Act of 1988*, 28 U.S.C. § 1330 (1988) (*F.S.I.A.*) and the *Vienna Convention, supra*, but the Ninth Circuit is in conflict with itself regarding allegations of the same acts by the same individuals with respect to immunity under international law.

Only this Court can resolve this important conflict over the issue of immunity for acts by agents of a foreign sovereign committed within the United States.

III. The Ninth Circuit is in clear and direct conflict with two other circuits that have ruled on the issue of perfection of service on an agency or instrumentality of a foreign state, and service on individuals-agents of foreign sovereigns.

A. Service on Respondent CGDM

Two decisions within the Second Circuit and one within the D.C. Circuit have issued reported opinions which conflict with the Ninth Circuit opinion in this case on how service of summons and complaint upon agencies or instrumentalities is perfected under provisions of the F.S.I.A.

The opinion of the Circuit Court in this case at App. p. 10 indicates that service upon the Consulate (CGDM) as a separate legal person can only be perfected within the requirements of 28 U.S.C. § 1608(a).

Petitioner argued before the District Court and before the Circuit Court that service on an agency or instrumentality as a separate legal persons can be perfected under the provisions of § 1608(b)(2). See *Joseph v. Office of the Consulate General of Nigeria*, 880 F.2d 1018 (9th Cir. (1987).

The F.S.I.A. at 28 U.S.C. § 1603 defines an "agency or instrumentality of a foreign state" at subdivision (b). An instrumentality or agency of a foreign state means any entity--

> "(1) which is a separate legal person, corporate or otherwise, and

> (2) which is an organ of a foreign state or political subdivision thereof, or a majority whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country."

The District Court ruled at App. 35 that the only relevant provision of § 1608(b) would be § 1608(b)(3)(B). Section 1608(b)(3) requires a copy of a translation into (Spanish) which was not provided to any of respondents served in the United States in this case.

However, section § 1608(b) for service:

> " . . . upon an agency or instrumentality of a foreign state:"

provides that service may be prefected under 1608(b)(2) in the United States upon an officer, manager or general agent with no translation requirement. Service under F.S.I.A., 28 U.S.C. § 1608 is at App. p. 69.

The Ninth Circuit panel found improper service on the Mexican Consulate recognizing the CGDM to be a "separate legal person" but also found CGDM to be--"a foreign state" thereby requiring service under § 1608 subdivision (a) ruling that:

> "Gerritsen did not perfect service because he sent only an English language version

of the complaint."

Appendix p. 10.

The Second Circuit in *Banco Metropolitano v. Desarrrollo de Autopistas*, 616 F.Supp. 301 (D.C. N.Y. 1985) explicityly contradicts these Ninth Circuit ruling on service of process on agencies or instrumentalities of foreign sovereigns in the United States regarding the requirement of a translation.

Judge Sweet quoted the legislative history (1976 U.S. Cong. & Ad. News 6604, 6624):

> "If no such [special] arrangement [for service of process] exists, then service must be made under subsection (b)(2) which provides for service upon officers, or managing, general or appointed agents in the United States of the agency or instrumentality . . .
> "If there is no special arrangement and if the agency or instrumentality has no representative in the United States service may be made under one of the three methods provided in subsection (b)(3)."

Obviously CGDM has offices and agents and consuls in the United States and in fact respondent CGDM has no offices outside the United States.

Judge Sweet found that:

> " . . . the logic and structure of the

> subsection compels the conclusion that subsection (b)(2) applies to delivery in the United States where it is presumed that officers of the foreign state will have familiarity with English, or at least access to such familiarity, while § (b)(3) applies to service in the country of the foreign state to be served."

The facts in this case regarding service are virtually identical to that in the Second Circuit. Judge Sweet found substantial compliance with the service requirements:

> "In view of service on the consulate in New York, and in view of the receipt of actual knowledge of the Summons and Complaint in Guatemala, albeit not in a Spanish version, and without mailing by the clerk of the court, substantial compliance has been achieved, as it was in *International Schools Service v. Government of Iran*, 505 F.Supp. 178 (D.N.J. 1981); *Harris v. National Iranian Radio & Television*, 691 F.2d 1344 (11th Cir. 1982); and *New England Merchants Natl. Bank v. Iran Power Generation and Transmition Co.*, 495 F.Supp. 73 (S.D.N.Y. 1980)"

(Underline emphasis added.)

Also within the Second Circuit the court ruled in *United Euram Corp. v. Union of Soviet Socialist*

Republics, 461 F.Supp. 609, 613 that the fact of actual receipt of service is decisive:

> "Thus, whether the U.S.S.R. received the summons and complaint is a question of fact that cannot be resolved at this stage without an evidentiary inquiry."

In *Marlowe v. Argentine Naval Commission*, 604 F.Supp. 703, 708 (1985) Judge Charles R. Richey ruled that service under F.S.I.A. statutes is determined by whether there is a dispute over actual notice being received:

> "The defendant does not disput that it received notice of the suit, and under the circumstances of this case, such notice is sufficient. *(See Harris Corp. v. National Iranian Radio and Television*, 691 F.2d 1344, 1352 (11th Cir. 1982)"

B. Service on Individual Defendants:

The U.S. Court of Appeal in its Opinion-Judgment of 30 March 1993, a copy of which is in the appendix hereto, ruled in conformity to the District Court that petitioner did not perfect service upon respondents Garcia or Uribe.

At the Ninth Circuit Court of Appeals opinion at App. p. 9 the panel found that petitioner failed to leave the summons and complaint with an authorized agent at the defendant's place of employment, citing *Daly-Murphy v. Winston*, 837 F.2d 348, 355 (9th Cir. 1987) and

characterizes the service on Garcia and Uribe as " . . . leaving the paperwork with a co-workeer of the Mexican Consulate."

The record before both the District Court and the Ninth Circuit indicates that service was perfected by leaving the summons and complaint with co-respondent, Consul of Mexico Enrique Silva Guzman. Respondent Silva has appeared on all filings in the courts below designated as "Consul of the United States of Mexico pro se."

Consuls and even vice consuls have a status recognized under United States law providing original jurisdiction in district courts exclusive of state courts in all actions and proceedings against consuls or vice consuls of foreign states, see 28 U.S.C. § 1351, which modified by statute the constitutional provision in Article III, Section 2, subsection 2, which gives the Court original jurisdiction in all cases where a consul is a party. (See United States Constitution, Article III, Section 2, Subsection 2 at App. p. 67.

As all respondents upon receiving actual service of the summons and complaint have responded immediately with motions to the District Court and have responded to both appeals in this case to the U.S. Ninth Circuit Court of Appeals there can be no doubt as to actual service upon them.

Therefore, the conflict between the circuits as to the necessity of service with translation on an agency or instrumentality and the conflict between the circuits as to actual service upon all respondents is apparent and

requires that this Court grant this petition for a writ.

The courts below have found no personal jurisdiction over consul Garcia or Uribe either in their official capacities or as individuals because of defective service of process by leaving the summons and complaint with a co-worker, when in fact that co-worker, Silva, was a consul of the United Mexican States.

The courts below have also found defective jurisdiction over CGDM for failure to provide a Spanish translation, when the statute involved clearly does not require it on agencies or instrumentalities of foreign states.

CONCLUSION

Petitioner does not ask that this Court to reinterpret the law or expand the scope of civil rights or for a more inclusive First Amendment. His only request is a measure of consistency in the courts on the questions of: When is there liability in civil rights violations, for what acts are foreign sovereigns immune and how service of process is perfected. If any of those questions are clarified it is inevitable that an increase of justice will follow.

This Court should grant this petition.

Respectfully submitted,

JACK GERRITSEN, Pro se

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACK GERRITSEN,	)	No. 92-55226
	)	D.C. No.
Plaintiff,	)	CV-85-5020-TJH
	)	
v.	)	OPINION
	)	
CONSULADO GENERAL DE MEXICO, et al.,	)	
	)	
Defendants.	)	
	)	

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, District Judge, Presiding

Submitted March 3, 1993*
Pasadena, California

Filed March 30, 1993

Before: Dorothy W. Nelson, Charles Wiggins,
Edward Leavy, Circuit Judges.

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* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

Opinion by Judge D.W. Nelson

Jack Gerritsen, Monterey Park, California, pro per for the plaintiff-appellant.

Carlos Pujalte Pineiro, Deputy Legal Advisor, Ministry of Foreign Affairs, United Mexican States.

OPINION

D.W. NELSON, Circuit Judge:

Appellant Jack Gerritsen ("Gerritsen") appears pro se, challenging the district court's grants of motions to dismiss and motions for summary judgment in favor of the defendants.[1] Specifically, he claims error in the district court's dismissal of the claims against the Federal

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[1] Gerritsen also raises on appeal the claim that the district court erred when it granted defendants' motion to allow the United Mexican States to appear pro se for the Consulate General. Gerritsen cites no authority to support his contention. Indeed, the district court acted well within its discretion in interpreting Local Rule 2.9.1 not to apply to foreign states and, thus, we do not upset its ruling. *See Guam Sasaki Corp. v Diana's, Inc.*, 881 F.2d 713, 715 (9th Cir. 1989)(citing *Lance, Inc. v. Dewco Services, Inc.*, 422 F.2d 778, 783-84 (9th Cir. 1970); *Miranda v. Southern Pacific Transp. Co.*, 710 F.2d 516 (9th Cir. 1983) ("District courts have broad discretion in interpreting and applying their local rules.") Furthermore, we can see no way in which the district court's ruling negatively affected Gerritsen. *See In the Matter of Telemart Enterprises, Inc.*, 524 F.2d 761, 766 (9th Cir. 1975) ("Although noncompliance with local rules is not itself sufficient reason to reverse, noncompliance which prejudices the losing party may be.").

Bureau of Investigation ("FBI") and FBI agent Carlos Berrios ("Berrios"); he also challenges the district court's summary judgment ruling in favor of the Consulate General of Mexico ("the Consulate" or the "Mexican Consulate"), and several officers or employees of the Consulate--Consul Javier Escobar y Cordova, Consul Agustin Garcia Lopez Santaolalla, Vice-consul Enrique Silva Guzman, and Assistant Salvador Uribe (collectively, "the consular defendants" or "the Mexican defendants"). We affirm the district court.

I. *Background*

In 1985, Gerritsen brought suit against more than 20 defendants, including the defendants named above, the City of Los Angeles, several of its employees, the Los Angeles Police Department (LAPD), and others. The district court eventually dismissed all of the defendants; Gerritsen does not appeal the vast majority of those dismissals. Gerritsen claimed that the defendants violated his constitutional rights under the First, Ninth and fourteenth amendments, the Racketeering Influenced and Corrupt Organizations Act (18 U.S.C. § 1962(c), (d)(1988)), 42 U.S.C. § 1985 (1988).

Gerritsen's claims essentially arise out of his political protest activities near the Mexican Consulate in Los Angeles in 1982, 1983 and 1984. The Consulate is housed in a building leased from the City of Los Angeles and located in El Pueblo State Historic Park. Gerritsen frequently chose the Consulate, with its long lines of people seeking visas and other paperwork, as a site to express his political views, which are extremely critical of the Mexican government. He distributed Spanish and

English language pamphlets, newspapers, and handbills near the Consulate; he gave speeches (sometimes using a loudspeaker or megaphone) there; and, sometimes attempted to confront the Consulate officials directly about various policies of the Mexican government.

Gerritsen's theory is that Mexican Consulate officials, the City of Los Angeles and its employees, park security guards, the LAPD, and the FBI conspired to deprive him of his First Amendment rights to distribute political literature, engage in political speech, and participate in other expressive activities. He alleges that the consular defendants inhibited his activities by asking him to desist in his protests and disruptions of consular business, threatening to take legal action against him, assaulting him, falsely imprisoning him, and kidnapping him.

In 1986, the district court dismissed with prejudice the complaint as to the Mexican defendants on the basis of lack of subject matter jurisdiction. Gerritsen appealed that decision to this court, which reversed and remanded the case with instructions to allow the plaintiff to amend his complaint, *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511 (9th Cir. 1987)("Gerritsen I"). Gerritsen subsequently amended his complaint in October 1987 and again in December 1987, now claiming subject matter jurisdiction over the Consulate and the Mexican defendants under 28 U.S.C. §§ 1330)(a) and 1351)(1988).

The district court again ruled in favor of these defendants, finding that Gerritsen did not perfect service on the Consulate, Garcia or Uribe and that the court did not have subject matter jurisdiction over Escobar or Silva.

Gerritsen v. Cordova, et al., 721 F.Supp. 253 (C.D. Cal., 1988). Gerritsen immediately appealed to this court, but this court refused to hear the appeal as it was not a final, appealable order.

In December 1987, the district court granted the FBI's motion to dismiss on the grounds that it lacked jurisdiction over suits brought against a federal agency *eo nomine* absent an explicit authorization of Congress. Nearly two years later, the district court granted FBI agent Berrios' motion for summary judgment, finding that the statute of limitations had expired.

In late 1991 and early 1992, the district court dismissed the remaining defendants--two private security companies, the City of Los Angeles, and several City employees. Gerritsen does not appeal the decisions as to these defendants. These dismissals transformed the earlier dismissals and grants of summary judgment into final orders, thus clearing the way for Gerritsen's timely appeal of the rulings in favor of the FBI, FBI Agent Berrios, the Mexican Consulate, and the Consulate officials.[2]

II. *Dismissal of the FBI*

Whether or not the FBI was immune from suit is a question of law which we review de novo. *Fort*

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[2] This case initially was assigned to U.S. District Judge Pamela A. Rymer, but upon her appointment to this court in 1989, the case was transferred to U.S. District Judge Terry J. Hatter. Judge Rymer made the rulings which are the subject of this appeal; thus references to "the district court" in the body of this Opinion are to her.

Vancouver Plywood Co. v. United States, 747 F.2d 547, 552 (9th Cir. 1984). The district court dismissed the FBI as a defendant in this case because it lacked jurisdiction over suits against a federal agency absent express statutory authorization.

The law of this circuit compels or affirmance of the court's dismissal. *See City of Whittier v. United States Department of Justice*, 598 F.2d 561, 562 (9th Cir. 1979); *accord, Abbott Bldg. Corp. Inc. v. Federal Savings and Loan Ins. Corp.*, 739 F.Supp. 532 (D. Nev. 1990), *aff'd* 951 F.2d 191 (9th Cir. 1991). Gerritsen's assertion that none of these cases concern the FBI is correct but irrelevant; what matters is that the FBI is a federal agency and that Congress has not revoked its immunity.[3]

III. *Dismissal of the FBI Agent*

The district court dismissed FBI Agent Berrios in 1989, finding that the statute of limitations for the alleged injury had expired. We review an application of the statute of limitations de novo. *Felton v. Unisource Corp.*, 940 F.2d 503, 508 (9th Cir. 1991). When such application turns on what a reasonable person should know, a mixed question of law and fact is presented which we review for clear error. *Rose v. United States*, 905 F.2d 1257, 1259 (9th Cir. 1990).

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[3] Gerritsen cites *CISPES v. F.B.I.*, 770 F.2d 468 (9th Cir. 1985), to support his claim. In that case, the Fifth Circuit did not invoke the FBI's immunity, choosing to dismiss the claim on other grounds. The law of this circuit, however, demands a different outcome.

In California, a so-called *Bivens* action against a federal agent is subject to a four year statute of limitations. *Gibson v. United States*, 781 F.2d 1334, 1342 (9th Cir.), *cert. denied*, 479 U.S. 1054, 107 S.Ct. 928, 93 L.Ed.2d 979 (1987). Gerritsen alleges that Berrios violated his constitutional rights by lying about the legality of his protest activities at the Consulate. This allegation is based on a conversation between Gerritsen and Berrios in August 1983. Gerritsen filed his original complaint in 1985, but he did not add Berrios as a defendant until December, 1987.

"[T]he touchstone for determining the commencement of the limitations period is notice: 'a cause of action generally accrues when a plaintiff knows or has reason to know of the injury which is the basis of his action.'" *Hoesterey v. City of Cathedral City*, 945 F.2d 317, 319 (9th Cir. 1991)(quoting *Cline v. Brusett*, 661 F.2d 108, 110 (9th Cir. 1991), *cert. denied*, ____U.S. ___ 112 S.Ct. 1941 (1992). In this case, then, the limitations began tolling August 1983, yet Gerritsen did not name Berrios as a defendant until December 1987--more than four years after the alleged violation. Thus, the district court properly found that the statute of limitations had expired.

The district court also made finding of fact regarding the relating back and tolling exceptions, and it concluded that these provisions did not apply in this case. The district court found that Berrios never received actual notice of the original 1985 complaint from Gerritsen; that Berrios had no way of knowing he would be sued at a later date; and that Berrios' himself had nothing to do with causing Gerritsen's delay in adding him to the

complaint. As these factual findings are not clearly erroneous, we will not reverse them.

IV. *Grant of Summary Judgment for the Mexican Defendants*

The district court granted the motion for summary judgment filed by the mexican consulate and the consulate defendants on two grounds. First, it found that it lacked personal jurisdiction due to improper service over the consulate itself and two individual defendants--Garcia and Uribe. Regarding the two remaining individual defendants, Escobar and Silva, the district court found that it lacked subject matter jurisdiction over them because they were immune under the Vienna Convention on Consular Relations ("Vienna Convention"). 21 U.S.T. 77. We affirm the district court in both respects.

A district court's ruling on whether or not there is personal jurisdiction is reviewed de novo. *Bourassa v. Desrochers*, 938 F.2d 1056, 1057 (9th Cir. 1987); *see also Joseph v. Office of the Consulate General of Nigeria*, 830 F.2d 1018 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988). We accept the factual findings on which the district court bases its jurisdictional conclusions as correct unless they are clearly erroneous. *Reebok Int'l, Ltd. v. Marnatch Enterprises, Inc.*, 970 F.2d 552, 554 (9th Cir. 1992).

A. *Lack of Personal Jurisdiction*

1. *Improper Service as to Garcia and Uribe*

Gerritsen sued the four individual Mexican defendants in both their individual and official capacities.[4] Under Federal Rule of Civil Procedure 4(d), in order to serve the defendants properly in their individual capacity, Gerritsen was required to serve them either personally or by leaving a copy of the summons and complaint at their usual place of abode. Instead, he attempted service on Garcia and Uribe by leaving the paperwork with a co-worker at the Mexican Consulate.

When defendants are sued in their official capacity, service may be made personally or by leaving the summons and complaint with an authorized agent at the defendant's place of employment. *Daly-Murphy v. Winston*, 837 F.2d 348, 355 (9th Cir. 1987). Since service was not made either personally or to an authorized agent to Garcia or Uribe, the suits against them in their official capacity must also be dismissed. Gerritsen does not refute the district court's factual conclusions regarding the manner of service.

2. *Improper Service As to the Consulate*

Gerritsen attempted to serve the mexican Consulate by having the district court clerk send an untranslated copy of the complaint to the President of Mexico by registered mail. Service of the consulate is

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[4] Gerritsen initially sued the four individual consulate officials in their individual capacities only; but in his Second Amended Complaint of December 1987, he sued them in both their individual and official capacities, but failed to undertake the official capacity analysis. We find that under both analyses, defendants Garcia and Uribe were not properly served.

governed by the foreign Sovereigns Immunity Act (FSIA). 28 U.S.C. § 1330 (1988). Since the consulate is a separate legal person, it is a "foreign state" within the meaning of the FSIA. *Joseph*, 830 F.2d at 1021 (citing *Gerritsen I*, 819 F.2d at 1517.

Section 1608(a) of the FSIA provides for four alternative methods of service, only one of which could apply in this case:

> (3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, *together with a translation of each into the official language of the foreign state*, by any form of mail requiring signed receipt, to be addressed and dispatched by the clerk of the court to *the head of the ministry of foreign affairs* of the foreign state concerned.

28 U.S.C. § 1608(b) (emphasis added). Even assuming that the president of Mexico is "the head of the ministry of foreign affairs," Gerritsen did not perfect service because he sent only an English language version of the complaint.

B. *Lack of Subject Matter Jurisdiction as to Others*

Gerritsen properly served only two of the consulate defendants, Consul Escobar and Vice-consul

Silva.[5] Gerritsen claimed jurisdiction over Escobar and Silva under 28 U.S.C. § 1351. The district court went on, however, to dismiss these defendants for lack of subject matter jurisdiction, concluding that they were immune under the Vienna Convention.[6] 21 U.S.T. 77.

Gerritsen alleges that Escobar and Silva took various actions and/or made various statements to him in an effort to inhibit or curtail completely his anti-Mexican government protest activity near the Consulate. Gerritsen said that, on various occasions in 1983 and 1984, Escobar verbally threatened him, placed him under citizen's arrest in the Consulate (until LAPD officers arrived to take Gerritsen into custody for disrupting the peace), and talked to the U.S. Attorney to explore legal options for restraining Gerritsen. Gerritsen alleged that Silva "interrogated and intimidated" him on one occasion in 1983. Despite orders from the district court to specify and elaborate upon these allegations and interrogatories from the defendants, Gerritsen never provided more detailed information. On this limited evidentiary basis, the district court concluded that Escobar and Silva were immune from suit under the Vienna Convention.

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[5] Defendant Uribe, who was dismissed as not properly served, committed the alleged acts of assault, false imprisonment, and kidnapping of Gerritsen. The remaining defendants, Escobar and Silva, allegedly committed acts of verbal harassment and threats against Gerritsen.

[6] The Vienna Convention is the authoritative treaty between the United States and Mexico governing consular relations and immunity. *Gerritsen*, 819 F.2d at 1515.

Immunity of consular officials is governed by Article 43 of the Vienna Convention: "Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect to acts performed in the exercise of the consular functions." 21 U.S.T. at 104. The term "consular functions" is defined in the several clauses of Article 5. Only one of these clauses is relevant here, 5(m), the catch-all provision which states:

> ". . . any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State of to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State."
>
> 21 U.S.T. at 82-85.

The district court found that the consular officials acted in order "to maintain the peace and dignity of the consular offices . . . [to protect] consular premises" and that these were legitimate consular functions within the meaning of Article 43.[7] "The functions of protecting the

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[7] In *Gerritsen I*, this court found that the acts of violence alleged by Gerritsen to have been committed by consular officials were not "consular functions" because they were per se illegal in this country. *Gerritsen*, 819 F.2d at 1517. Since that time, the record in this case has narrowed in two relevant respects: (1) the district court has made factual findings as to the nature of the "consular functions" involved

dignity and premises of the Consulate are reasonable functions of a foreign mission in this country, and they are not illegal in and of themselves. Thus, we agree that this was a "consular function" within the meaning of the Vienna Convention.

This does not end our inquiry, however, as the Vienna Convention also requires that the acts for which the consular officials seek immunity must be "performed in the exercise of the consular functions" in question.[8] *See Joseph*, 830 F.2d at 1027-28. In *Joseph*, this court found that the consular official's damage to and theft of property from a rented home had no connection whatsoever to his consular functions, and, consequently, that he was not immune under the Vienna Convention. *Ibid.*

Thus, the alleged acts taken by Escobar and Silva against Gerritsen must be shown to be in the furtherance of the functions of protecting the dignity and premises of the Mexican Consulate. The district court found that the defendants; alleged actions were taken "in response to plaintiff's [anti-Mexican government] leaflets and political speeches . . . in the proximity of the consulate . .

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involved here, based on evidence presented by the defendants; and, (2) it has become clear that Gerritsen did not allege that defendants Escobar and Silva (the defendants seeking immunity under the Vienna Convention) committed the alleged acts of assault, torture and kidnapping.

[8] The *Gerritsen I* court never reach this second question, since it found as a preliminary matter that the case did not involve legitimate "consular functions" under the Vienna Convention.

We also conclude, base upon the record before us (which Gerritsen had the opportunity to develop between 1985 and 1988), that the defendants' actions constitute reasonable efforts to effectuate the consular function of maintaining the dignity and safety of the Consulate. Consul Escobar's reliance on government officials in the host country (including the local police and the U.S. Attorney) was reasonable in the context of Gerritsen's repeated disruptions and refusals to leave the Consulate. Likewise, Escobar's and Silva's verbal warnings and threats, without accompanying physical contact, were attempts to persuade Gerritsen to leave the area or to desist from disrupting consular business.

V. *Conclusion*

We affirm the district court in all respects. The district court properly dismissed the FBI because it lacked jurisdiction absent express statutory authorization. The court also properly concluded that the statute of limitations barred Gerritsen's claim against FBI Agent Berrios. The district court did not err in finding that the plaintiff did not perfect service on defendants Garcia, Uribe, and the Consulate General itself. Finally, the court did not err in concluding that it lacked subject matter jurisdiction over defendants Escobar and Silva because they were immune from suit under the Vienna Convention.

AFFIRMED.

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

JACK GERRITSEN,	) CV 85-5020 (Kx)
	)
Plaintiff,	) JUDGMENT IN FAVOR
	)
v.	) OF DEFENDANT
	)
CONSULADO GENERAL DE MEXICO, et al.,	) CARLOS BERRIOS
	)
	)
Defendants.	) Filed Dec. 15, 1989
	) Entered Dec. 27, 1989

Defendant Carlos Berrios' Motion for Summary Judgment came on for hearing on June 6, 1988 before the Honorable Pamela Ann Rymer, then a United States

District Judge. Defendant Berrios was represented by Ian Fan, Assistant United States Attorney. Plaintiff represented himself in propria persona.

At the June 6, 1988 hearing, the Court reserved ruling on the motion, and requested that the parties brief the issue of whether state tolling principles apply. The parties submitted supplemental briefs pursuant to the Court's request.

After consideration of both the moving as well as supplemental papers, the argument at the hearing, and in conjunction with the Memorandum of Decision and Order filed on October 30, 1989,

IT IS ORDERED, ADJUDGED AND DECREED that defendant Berrios' Motion for Summary Judgment be granted. Accordingly judgment is entered in favor of defendant Berrios and against plaintiff.

DATED: This 12th day of Dec., 1989.

Pamela Ann Rymer
Unites States District Judge

Presented by:
GARY A. FEESS
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division
IAN FAN
Assistant United States Attorney
Attorneys for Defendant Berrios

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

JACK GERRITSEN,	)	No. CV85-5020-PAR
	)	
Plaintiff,	)	MEMORANDUM OF
	)	DECISION AND
v.	)	ORDER
	)	
CONSULADO GENERAL	)	
DE MEXICO, et al.,	)	
	)	
Defendants.	)	Filed October 30, 1989
	)	Entered October 31, 1989

The claims in plaintiff's second amended complaint primarily arise out of plaintiff's protests over a period of years in El Pueblo De Los Angeles State Historic Park against certain Mexican government policies and the alleged response of the defendants to these protests. Moving party F.B.I. agent Carlos Berrios spoke to plaintiff on August 16, 1983 concerning these activities; plaintiff's claims against defendant stem from this incident. Defendant now moves for summary judgment on the ground that the statute of limitations bars this action.

Facts Not Genuinely Disputed

1. On August 16, 1983, while assigned to the Los Angeles, California, division of the Federal Bureau of

Investigation, Special Agent Carlos Berrios and Richard Schneider interviewed the plaintiff. Defendant conducted this interview after the FBI received a complaint from the Mexican Consulate that plaintiff was interfering with its function.

2. Agents Berrios and Schneider identified themselves to plaintiff by name and agency, and advised him that his actions were a possible violation of the Protection of Foreign Officials Act, 18 U.S.C. § 112(b)(3). The agents did not arrest plaintiff.

3. Plaintiff filed a request under the Freedom of Information Act ("FOIA") for documents relating to the August 16, 1983 interview. Whether he received these documents on November 5-6, 1983, as his pleadings indicate, or January 3, 1985, as his Memorandum in Opposition contends, appear to be immaterial in that plaintiff knew who Berrios was, and what he did, at the time of the incident.

4. Plaintiff filed the instant action in 1985. In his original complaint, plaintiff named as defendants various officials of the Mexican government, and alleged that these defendants acted in various unlawful and specific ways to stop him from distributing leaflets outside the Mexican Consulate.

5. Plaintiff filed an amended complaint on October 16, 1987, and added additional defendants, including the FBI. The FBI moved to dismiss, and on December 7, 1987 this motion was granted. Plaintiff was granted leave to amend.

6. Plaintiff filed a second amended complaint on December 23, 1987 that added as defendants William Webster, Carlos Berrios, and Richard Schneider. Defendant Berrios learned of this lawsuit for the first time in January 1988.

7. The three federal defendants moved to dismiss on the ground that, among other things, they had not been served. On February 8, 1988 this motion was granted.

8. Defendant Berrios was properly served on March 17, 1988.

Standard

Fed. R. Civ. P. 56(b) provides that a defending party may move for summary judgment if the pleadings and supporting material "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment in favor of the defendant is therefore appropriate if plaintiff fails to: 1) produce evidence to support the existence of all essential elements on which plaintiff bears the burden of proof; and (2) show that all disputes about material facts or necessary inferences from the facts could reasonably be resolved in favor of either party by the trier of fact. See California Architectural Bldg. prods., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987), cert. denied, 108 S.Ct. 698 (1988); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); Matsushita v. Zenith Radio, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538

(1986). See generally Schwarzer, Summary Judgment and Case Management, 56 Antitrust L.J. 213, 218 (1987)("undisputed evidence submitted by a plaintiff may be insufficient to sustain a verdict which turns on a mixed question of law and fact under the applicable substantive law").

Statute of Limitations

Plaintiff's claims against defendant Berrios are in his individual capacity. Suits against federal agents in their individual capacity for the violation of constitutional rights are permitted. Bivens v. Six Unknown Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). Bivens actions arising in California are subject to a four year statute of limitations. Gibson v. United States, 781 F.2d 1334, 1342 (9th Cir. 1986), cert. denied, 479 U.S. 1054, 107 S.Ct. 928, 93 L.Ed.2d 979 (1987). The incident occurred on August 16, 1983. Plaintiff filed the complaint naming defendant Berrios on December 23, 1987. Plaintiff filed the original complaint in 1985. Therefore, for plaintiff's claims against defendant to be timely either they must relate back to the date of the original complaint for the statute of limitations must be tolled.

1. Relation Back

Fed. R. Civ. P. 15(c) permits an amendment of a complaint that adds a party to "relate back" to the date of the original complaint if the new claim arises from the same conduct, transaction, or occurrence set forth in the original pleading, provided that the party named in the amendment: "(1) has received such notice of the institution of the action that the party will not be

prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party."

Plaintiff apparently does not contest that none of these criteria is present in this case. Nor are they. The original complaint simply alleged deprivations of rights by the Mexican defendants; the conduct of defendant Berrios is therefore a separate transaction. Furthermore, defendant Berrios did not receive actual notice of the institution of this action. Berrios Declaration, p. 5. There is also nothing in the record to indicate that defendant Berrios should have realized that an action would be brought against him. The second amended complaint therefore does not relate back to the date of the original complaint.

2. Tolling

Where, as here, a federal court is applying a state statute of limitations to a claim, the court must also enforce coordinate state tolling rules, unless inconsistent with federal policy. Gibson v. United States, 781 F.2d 1342 & n.4; cf. Board of Regents v. Tomanino, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980)(holding in 42 U.S.C. § 1983 action that state tolling provisions must also be borrowed because they influence the length of limitations period). California applies both statutory and equitable tolling principles. In the absence of an applicable statutory tolling provision, as is the case here, equitable tolling doctrines apply. Jackson v. Hayakawa, 605 F.2d 1121, 1127 (9th Cir. 1979), cert. denied, 445 U.S. 952, 100 S.Ct. 1601, 63 L.Ed.2d 787 (1980). Of the

various implicit tolling exceptions that California courts have developed, see Lewis v. Superior Court, 175 Cal. App. 3d 366, 371-76, 220 Cal. Rptr. 594 (Cal. Ct. App. 1985), only the doctrine of estoppel is potentially applicable on the facts of this case. See generally 3 B. Witkin, California Procedure, Actions § 523 (3d Ed. 1985) (summarizing California estoppel doctrine).

Estoppel is appropriate only where the defendant has by his conduct induced plaintiff's belated filing of the action. For a party to be estopped from pleading the statute of limitations, several conditions must be met: (1) the party to be estopped must be apprised of the facts; (2) the other party must be ignorant of the true state of facts; (3) the party to be estopped must have intended that its conduct be acted upon, or must have acted such that the other party had a right to believe that it was so intended; and (4) the other party must rely on the conduct to its prejudice. California Cigarette Concessions, Inc. v. City of Los Angeles, 53 Cal. 2d 865, 869, 350 P.2d 715, 3 Cal. Rptr. 675 (1960); Muraoka v. Budget Rent A Car, Inc., 160 Cal. App. 3d 107, 115-116, 206 Cal. Rptr. 476 (Cal. Ct. App. 1984).

There are no allegations whatsoever in plaintiff's complaints of any conduct on the part of defendant Berrios which induced plaintiff to fail to name Berrios as a defendant until the filing of the second amended complaint on December 23, 1987. Plaintiff merely alleges that on August 16, 1983, defendant Berrios (after fully identifying himself) informed plaintiff that his actions were a possible violation of 18 U.S.C. § 112(b)(3). Plaintiff's only response is that he did not name Berrios as a defendant until the second amended

complaint because he was not aware that 18 U.S.C. § 112(b)(3) might be unconstitutional until 1985. However, the Statute of Limitations is not tolled merely because a party is ignorant of the legal significance of known facts, see Jolly v. Eli Lilly & Co., 44 Cal. 3d 1103, 1110, 751 P.2d 923, 245 Cal. Rptr. 658 (1988), or belatedly discovers legal theories, see Kensinger v. Abbott Laboratories, 171 Cal. App. 3d 376, 383, 217 Cal. Rptr. 313 (Cal. Ct. App. 1985), absent affirmative misconduct by the defendant. Because no such conduct by Berrios is alleged, there is no reason to toll the statute of limitations.

THEREFORE, IT IS ORDERED that defendant Berrios' motion for summary judgment is granted. Defendant shall lodge a proposed judgment within five (5) days of this order.

DATED: October 30, 1989 PAMELA ANN RYMER
United States Circuit Judge
(sitting by designation)

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT CALIFORNIA

JACK GERRITSEN,	)	C.A. No.
	)	CV85-5020-PAR
Plaintiff,	)	
	)	
v.	)	
	)	
JAVIER ESCOBAR Y CORDOVA, et al.,	)	
	)	
Defendants.	)	
	)	

Jack Gerritsen, Monterey Park, CA, in pro. per.

Robert C. Bonner, U.S. Atty., Stephen Petersen, Assistant U.S. Atty., Los Angeles, Cal., Vincent M. Garvey, Richard C. Stearns, Dept. of Justice, Civil Division., Washington D.C., Alberto Szekely, Mexico City, United Mexican States, Eduardo de Iarolla, Los Angeles, Cal., for defendant Consulado General de Mexico.

MEMORANDUM OF DECISION AND ORDER

(Filed September 21, 1988)

RYMER, District Judge.

Plaintiff charges moving defendants Consulate General of the United Mexican States, Javier Escobar Y Cordova, Agustin Garcia Lopez Santaolalla, Enrique Guzman, and Salvador Uribe with engaging in a conspiracy to deprive him of his civil rights, acts of assault with a deadly weapon, battery, false imprisonment, kidnapping, intentional infliction of emotional trauma, theft, destruction of property, and false arrest. Plaintiff's Preliminary Statement of Pre-Trial Contentions of Fact at 3. The dispute arises out of plaintiff's distribution of leaflets and other activities around the Mexican Consulate in Los Angeles and defendants' efforts to stop these activities. Jurisdiction is alleged pursuant to 28 U.S.C. § 1351 (actions against consuls and vice consuls) and 28 U.S.C. §§ 1330(a), 1602-1611 (Foreign Sovereign Immunities Act).[9] Defendants assert that this court lacks subject matter jurisdiction under either statute and therefore move for summary judgment.

Plaintiff filed his original complaint on July 30, 1985. It contained allegations against the moving defendants and President Miguel de la Madrid Hurtado of the United Mexican States; the alleged jurisdictional basis for the complaint was 28 U.S.C. § 1343. This court

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[9] Plaintiff's complaint contains other claims and bases for jurisdiction. They have either been dismissed or are not applicable to these defendants.

found that it lacked personal jurisdiction over President of Mexico and that it lacked subject matter jurisdiction under § 1343, accordingly, President de la Madrid was dismissed with prejudice and plaintiff's complaint was dismissed for subject matter jurisdiction. Order at 11. In *Gerritsen v. Hurtado*, 819 F.2d 1511 (9th Cir.1987) the Ninth Circuit upheld the court's ruling on § 1343, but--believing that plaintiff was denied leave to amend--suggested 28 U.S.C. §§ 1330(a) and 1351 as other possible sources of jurisdiction and remanded the case.

Facts Not Genuinely Controverted

1. Plaintiff originally filed his complaint in this action on July 30, 1985.

2. Plaintiff filed his First Amended Complaint on October 16, 1987 and his Second Amended Complaint on December 23, 1987.

3. Plaintiff served the original complaint by having a clerk of this court mail the complaint to the Offices of the President of the United Mexican States. Gerritsen Declaration, Exhibit C. This service was received in that office on August 20, 1985. Felix Declaration ¶ 7.

4. Plaintiff served the individual defendants as follows:

(a) Javier Escobar--process server personally served him summons and complaint at the Mexican Consulate in San Diego, California, on August 12, 1985. Gerritsen Declaration, Exhibit H.

(b) Agustin Garcia--process server left summons and complaint with Enrique Silva at the Mexican Consulate in Los Angeles, California, on August 7, 1985. *Id.*, Exhibit I.

(c) Enrique Silva--process server personally served him summons and complaint at the Mexican Consulate in Los Angeles, California, on August 5, 1985. *Id.*, Exhibit J.

(d) Salvador Uribe--process server left summons and complaint with Enrique Silva at the Mexican Consulate in Los Angeles, California, on August 7, 1985. *Id.*, Exhibit K.

5. Relevant allegations in plaintiff's Pre-Trial Memorandum ¶ against defendant Escobar are that:

(a) on August 5, 1983 defendant approached plaintiff and told him that "action would be taken against him." Los Angeles police officers thereafter detained plaintiff for forty minutes while the officers spoke with defendant and others. SAC ¶ 31.

(b) on September 20, 1983 defendant placed plaintiff under citizen's arrest and restrained plaintiff until the Los Angeles police arrived to take plaintiff into custody. ¶ 36.

(c) on March 15, 1984 defendant leased ten thousand square feet of open space around the Consulate. SAC ¶ 48.

(d) on July 31, 1984 defendant grabbed plaintiff's shoulder to restrain him from distributing leaflets.

(e) on December 2, 1983 defendant requested that Alexander H. Williams III of the Office of the United States Attorney for the Central District of California "take whatever measures were necessary to prevent Mr. Gerritsen from continuing to disturb the peace as well as the impairment of its [the consulate's] dignity." SAC ¶ 41.

6. Relevant allegations in plaintiff's Pre-Trial

Memorandum ¶ 3 against defendant Garcia are that:

(a) on March 15, 1984 defendant leased ten thousand square feet of open space around the Consulate. SAC ¶ 48.

(b) on June 20, 1985 defendant threatened "to take more serious measures against plaintiff." Later on that day an employee of the consulate pointed a gun at plaintiff, who was standing twelve feet away. SAC ¶ 49.

7. Plaintiff makes no relevant allegations against defendant Silva i his Pre-Trial Memorandum. (Plaintiff states in his response to defendants' Interrogatory 13 that defendant Silva on June 28, 1983 "interrogated and intimated" plaintiff.

8. Relevant allegations in plaintiff's Pre-Trial Memorandum ¶ 5 against defendant Uribe are that:

(a) on June 28, 1983 defendant struck plaintiff with his fists and feet. SAC ¶ 26.

(b) on August 5, 1983 defendant pushed plaintiff down a flight of stairs. SAC ¶ 31.

(c) on October 6, 1983 defendant punched and pushed plaintiff. SAC ¶ 37.

(d) on October 25, 1983 defendant Uribe "attacks plaintiff," breaks his glasses, and tears his shirt. SAC ¶ 39.

(e) on June 18, 1984 defendant Uribe pushed and punched plaintiff away from the consulate. SAC ¶ 44.

(f) on June 20, 1985 defendant pointed a gun in a threatening manner at plaintiff. SAC ¶ 49.

(g) on July 17, 1985 defendant struck plaintiff with a heavy metal cylinder. SAC ¶ 50.

(h) on July 19, 1985 defendant struck plaintiff on the face. SAC ¶ 51.

(i) on July 25, 1985 defendant struck plaintiff with a heavy metal sign. SAC ¶ 52.

(j) on July 26, 1985 defendant struck plaintiff with his left foot. SAC ¶ 53.

(k) on December 19, 1985 defendant struck plaintiff with two lengths of chain. SAC ¶ 58.

9. The individual defendants are either consuls or an employee of the consulate.

10. The Mexican government believes that the individual defendants were acting in an official capacity during their encounters with plaintiff. Rivas Declaration ¶ 7.

Possibly Controverted Facts that are not Material

1. Whether other employees or agents of the Mexican Consulate committed the acts alleged by plaintiff. Because plaintiff has not properly served the Consulate, these acts cannot give rise to liability.

Standard

Federal Rules of Civil Procedure 56(b) provides that a defending party may move for summary judgement if the pleadings and supporting material "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Federal Rules of Civil Procedure 56(c). Summary judgment in favor of the defendants is therefore appropriate if plaintiff fails to: (1) produce evidence to support the existence of all essential elements on which plaintiff bears the burden of proof; and (2) show that all

disputes about material facts or necessary inferences from the facts could reasonably be resolved in favor of either party by a trier of fact. *See, California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir.1987); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); *Matsushita v. Zenith Radio*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.#d.2d 538 (1986). *See generally*, Schwarzer, *Summary Judgment and Case Management*, 56 Antitrust Law Journal 213, 218 ("undisputed evidence submitted by a plaintiff may be insufficient to sustain a verdict which turns on a mixed question of law and fact under the applicable substantive law").

Defendants move for summary judgment on the grounds that (1) plaintiff has not effected proper service against any of the parties; (2) the court lacks subject matter jurisdiction over the individual defendants because they are immune from suit under the applicable provisions of the Vienna Convention on Consular Relations; and (3) the court lacks subject matter jurisdiction over the Consulate under the applicable provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.* Finding the arguments that it reaches well taken, the court grants defendants' motions.

Service of Process

In its earlier ruling on these defendants' motion to dismiss the court found on the sparse record before it that plaintiff had failed to carry his burden of proving that he properly served any of these defendants. The court granted plaintiff one week to supply documentation that

he had effected proper service; plaintiff did so. Defendants responded with further argument about why even the augmented record did not support a finding of proper service. Defendants brought the instant motion before the court had ruled on this issue. Based on all the papers that the parties have submitted on this issue, the court now finds that plaintiff has failed to serve properly any of the defendants.

1. The Individual Defendants

Service on individuals is governed by Federal Rules of Civil Procedure 4(d), which states in relevant part:

> Service shall be made as follows:
>
> (1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and complaint to the individual personally or by leaving copies thereof at the individuals's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

Although service of the original complaint was personally made on defendants Escobar and Silva, service on the other defendants was not. Leaving a copy of the summons and complaint at a place of business does not satisfy the "abode" method of service under Rule 4. *See, Cohen v City of Miami*, 54 F.R.D. 274, 278 (S.D.Fla.

1972); *Gipson v Township of Bass River*, 82 R.R.D. 122, 125 (D.N.J. 1979). Neither is there any indication that defendant Silva, who was served on behalf of defendants Garcia and Uribe, was their agent for service of process; this provision is strictly construed. *See, Gipson*, 82 F.$.D. at 125; Wright & Miller, Federal Practice and Procedure: Civil § 1097 (1969).

Defendants argue that any service of process made within the Consulate is also void under Vienna Convention. Article 31 of this treaty states:

> Inviolability of Consular Posts:
>
> (1) Consular posts shall enjoy the inviolability which they are granted by this article.
> (2) The authorities of the receiving State shall not penetrate the parts of the consular post which are used exclusively for the work of the consular office, except with the consent of the head of the consular office . . .

Defendants also note that under the FSIA the service of process on a consulate is not effective against that state. *See, 40 D 6262 Realty Corporation v. United Arab Emirates*, 447 F.Supp. 710 (S.D.N.Y. 1978).

This argument is not persuasive. Plaintiff served defendants Escobar and Silva in their individual capacity, not as representatives of the Mexican government. There is no indication that the process server entered the consulate surreptitiously or without the consent of the Consulate. Accordingly, defendants Escobar and Silva

were properly served; the claims against Garcia and uribe are dismissed.

2. The Consulate General

Proper service on the consulate is governed by the FSIA. *See, Gray v. The Permanent Mission of the People's Republic of the Congo to the United Nations*, 443 F.Supp. 816, 820 (S.D.N.&. 1978), aff'd 580 F.2d 1044 (2d Cir. 1978). Section 1608(a) of the FSIA governs service on foreign states and provides for four alternative methods:

> (1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or
> (2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or
> (3) if service cannot be made under paragraphs (1) or (2) by sending a coy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or
> (4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and

> a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services--and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted. 28 U.S.C. § 1608.

The only possibly effective service on the Consulate was the mailing of the complaint to the Office of the President of Mexico. Even accepting plaintiff's argument that the Office of the Presidency qualifies as the head of the ministry of foreign affairs, this service is defective under § 1608(b). This subsection applies to agencies or instrumentalities of foreign governments. The legislative history of the FSIA states:

> "As a general matter, entities which meet the definition of an 'agency or instrumentality of a foreign state' could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is

> suable in its own name." 1976 United States Administrative News & Code at 6614.

The Consulate General is not a "department or ministry which acts and is suable in its own name" and which has an existence apart from the United Mexican States. Felix Declaration ¶¶ 3,4. The courts in *40 D 6262 Realty Corporation v. United Arab Emirates Government*, 447 F.Supp. 710, 711 (S.D.N.Y. 1978) and *Gray v. Congo*, 443 F.Supp. at 820 applied § 1608(a) to a "diplomatic mission." *See also, Unidyne Corp. v. Aerolineas Argentinas*, 590 F.Supp. 398 (E.D.Va. 1984); *Marlowe v. Argentine Naval Commission*, 604 F.Supp. 703 (D.D.C. 1985).

Assuming, however, that § 1608(b) does apply, the only relevant provision would be § 1608(b)(3)(B):

> (3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give notice, by delivering of the summons and complaint, together with a translation of each into the official language of the foreign state--
>
> (B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, . . .

Plaintiff failed to provide all the necessary documents to effect service by this method. Under the FSIA, a defendant must be properly served before this court acquires personal jurisdiction over it. *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 817 (3rd Cir. 1981)

("Personal jurisdiction over the sovereign exits when the minimum contacts and requirements set forth in §§ 1605-1608 are satisfied."). The claims against the Consulate General must therefore be dismissed without prejudice for lack of subject matter jurisdiction.

Consular Immunity

The immunity of Consular officials from suit is governed by the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. 6820, 596 U.N.T.S. 261. Article 43 of the Vienna Convention provides as follows: "Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions." 21 U.S.T. at 104. The term "consular functions" is defined in Article 5. It states in claus m that consular functions consist in:

> performing any other functions entrusted to a consuiar post by the sending State which are not prohibited by the laws and regulation of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State. 21 U.S.T. at 85.

Defendants assert that all actions they took against plaintiff were to protect the peace and dignity of the consulate.

In *Gerritsen*, 819 F.2d at 1516-17 the Ninth

Circuit stated that many of the allegations in the original complaint described activities that were not covered under the Vienna Convention's immunity provisions. Because the record has been narrowed since the Ninth Circuit decision, the immunity issue must be reexamined in light of the record as it now appears.

Defendants Escobar and Silva state that their actions were taken to maintain the peace and dignity of the consular offices. Protection of consular premises is not explicitly mentioned in the Vienna Convention's list of Consular activities. Nonetheless, consular officials may pursue other functions with immunity if the functions meet the limitations in Article t(m). Nothing in the record suggests that this function is prohibited by any treaties or that the United States has objected to consular exercising this function. Nor is the court aware of any laws or regulations that prohibit the exercise of this function. In the *Message from the President of the United States Transmitting the Vienna Convention on Consular Relations*, 91st Cong., 1st Sess. 49 (1969)(Exec. E)(report of the U.S. Delegation) the United States delegation interpreted this phrase in Article 5(f) to mean that the function assumed by the consular officials must not "displace" local authorities in the exercise of functions conferred on them by law. Although local law enforcement officers have the duty of protecting property, this duty is traditionally shared with owners. Accordingly, protection of consular premises is a legitimate consular function within Article 5(m).

The next question is whether the acts allegedly taken against plaintiff were within this function. There is little case law or intentional practice that serves as a guide in developing useful criteria for determining whether a particular act is within the scope of a consular

function. However, courts that have dealt with this question have considered: (1) whether the act is a reasonable means to the fulfillment of the function. Some of the relevant criteria in determining these issues are: (1) the subjective intent of the consular official, based on objective evidence, in performing a particular act, *Boyer and Another v Aldrete*, 23 I.L.R. 445 (Tribunal Civil de Marseille); *Commonwealth v Jerez*, 390 Mass. 456, 457 N. E.2d 1105, 1108-09 (1983); (2) whether the act furthered some function of the consulate, *Joseph v. Office of the Consulate General of Nigeria*, 830 F.2d 1018 (9th Cir. 1987); (3) whether the act is of a "personal character," *Bigelow v Princess Zizianoff*, 4 I.L.R. 384 (Tribunal Correctional of the Seine 1928); (4) the seriousness of the act, *Id.*; and (5) the absence or presence of a malicious motive in the performance of a particular act, *Maas v. Seelhiem*, 8 I.L.R. 404 (Manitoba King's Bench 1936).

Thus, in *Joseph v. the Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1020 (9th Cir. 1987) the court found that claims for breach of contract, conversion, trespass, and waste brought against a Nigerian Consul by his landlord were not covered by consular immunity because the dispute concerned only the defendant's private residence and was not connected to the defendant's official duties. In contrast, in *Commonwealth v. Jerez, supra*, the defendant allegedly assaulted a police officer (who believed that Jerez had been trespassing) when the defendant was on the way to an official cultural function. The court found that the defendant was immune from suit because he was attempting to carry out a legitimate function at the time of the incident. *See also, Heaney v. Government of Spain*, 445 F.2d 501, 505 (2d Cir. 1971)(holding that

defendants' contract with plaintiff to support his propaganda activities against the British government furthered official function); *Waltier v. Thomson*, 189 F.Supp. 319, 320-21 (S.D.N.Y. 1960)(false statements made by defendant to induce plaintiff to immigrate held covered by consular immunity).

Based on the record that exists against these defendants, their alleged acts were attempts to protect the consulate and thus the defendants were exercising an official function. All of these defendants' alleged acts--"threats," physical encounters, communications with American officials--were in response to plaintiff's leaflets and political speeches. Nothing in the record indicates that defendants acted against plaintiff except when he was in the proximity of the consulate or some other official Mexican function. Finally, while not determinative, the Mexican government believes that these defendants were acting in an official capacity. Accordingly, the claims against the remaining two defendants are dismissed.

JACK GERRITSEN
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Monterey Park, CA 91754
(213) 560-4318

Plaintiff, PRO SE

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

JACK GERRITSEN,	) CV 85-5020
	) PAR (Kx)
Plaintiff,	) OPPOSITION
	) TO MOTION FOR
v.	) SUMMARY JUDGMENT
	) RE: DEFENDANT
ESCOBAR Y CORDOVA	) CARLOS BERRIOS
et al.,	)
	)
Defendants.	) Filed May 4, 1988
	)

To defendant Carlos Berrios, his attorney of record and all other interested parties in this action, at the above time and place plaintiff will oppose the Motion for Summary Judgment based upon the following:

MEMORANDUM OF POINTS AND AUTHORITIES

TABLE OF AUTHORITIES

I. PLAINTIFF'S ALLEGATIONS OF FEDERAL DEPRIVATION OF FIRST AMENDMENT RIGHTS . . . . . Page 2

II. EQUITABLE TOLLING . . . . . Page 3

III. SUBSTANTIAL AND DISPUTED ISSUES OF FACT . . . . . Page 6

I

PLAINTIFF HAS ADEQUATELY ALLEGED FEDERAL DEPRIVATIONS OF FIRST AMENDMENT RIGHTS BY THIS DEFENDANT A FEDERAL EMPLOYEE

The first amendment to the United States Constitution has always been held to protect citizens in the exercise of speech and press from the acts of the federal governemnt and its agents.

The plaintiff in Para. 17 of his complaint has alleged

> The U.S.A. Federal Bureau of Investigation (hereafter F.B.I.) acted with numerious other named defendants under color of State/Federal law,as herein alleged to deprive this plaintiff and others of civil

> rights in El Pueblo de Los Angeles State Historic Park, just two blocks from this Court, by sending agents to intimidate and threaten to arrest this plaintiff for violation of Federal statutes if he entered within 100 feet of the Biscailuz building wherein the City of Los Angeles/Recreation and Parks Commission rents space to defendant CGDM, by director W. Webster.

This plaintiff has further alleged in Para. 33 of his complaint:

> 16 Aug. 1983 On this date F.B. I. agents Richard Snyder # 5456, and Carlos Berrios #3687 confronted this plaintiff outside the offices of CGDM, with interrogatories with respect to his activities at that location, and persisted and insisted that this plaintiff enter the offices of CGDM within the Biscailuz Bldg mentioined in paragraph 26 above, where this plaintiff was physically abused by agents of U.M.S. in handcuffs on June 28, 1983. In that room those F.B.I. agents informed this defendant that he has violated federal law 18 USCS 112(b) which forbids him to come within 100 feet of the Mexican Consulate, and that he will be arrested on those federal charges if he should come within 100 feet of the building. A later similar incident by additional F.B.I. agents is detailed at 21, July 1986 of this Chronology.

At Para. 62 of plaintiff's complaint he alleges additional facts regarding F.B.I. agents threats and intimidations to arrest plaintiff for his acts near the offices of CGDM , taking place on "21 July 1986".

As this plaintiff's complaint if "FOR DEPRIVATION OF SPEECH AND PRESS, . . ." the acts alleged by this defendant with others who are named as defendants and others who are not named as defendants but employed by the F.B.I., were clearly done with the impermissible motive of curbing this plaintiff's protected speech and press rights.

II

EQUITABLE TOLLING

This defendant Barrios correctly identifies a statute of limitations perior for this First Amendment deprivation by Federal agents in California as 4 years.

Although this Court is not bound by decisions reached in the 5th Circuit, the Court in CISPES v. F.B.I.,770 F2d 468, 471 (5th Cir 1985), has this same set of facts with the single exception to the absence in that case of an allegation of a custom, pattern, policy of F.B.I. agents to impermissably and unconstitutionally deny demonstration, speech, and press rights within 100 feet of foreign consulates. The Court in CISPES ruled for the defendant for the absence a policy or pattern by F.B.I. agents, "citing a lack of evidence to support the conclusion that the statute would be unconstitutionally applied to the plaintiffs in the future." Additionally that

Court in reference to "peaceful picketing and leafletting" stated at p. 473 that "We are unconvinced however, that the statute here was intended to, or will in the future, be read as prohibiting such protected expression."

If this plaintiff's allegations are accurate and the documents supplied to plaintiff by the F.B.I. are accurate (herein attached as Exhibit "A") that court was wrong in assuming that the statute would not be used in the future to prohibit protected expression.

Therefore this plaintiff could not have learned from his personal experience that the pattern of F.B.I. agents using erroniously 18 USCS 112(b) to prohibit the exercise of speech/press within 100 feet of a consulate, until his second encounter with other agents on 21 July 1986, as alleged in his complaint at Para. 62). July 1986 is well within the 4 year statute of limitations period.

Moreover it was not until 1985 that the continued use of this statute if it occured to deprive plaintiff's of speech/press at consulates by F.B.I. agents, would be illegal, which is well within the 4 year statute of limitations for this Bivens action, and that fact could not have been known to this plaintiff until after the decision in CISPES in 1985. All of the agents involved in CISPES and Gerritsen did know or should have known that the plain reading of 18 USCS 112 specifically provides that protection of foreign officials from interference with their duties does not include protection from adverse or offensive speech/press.

The U.S. Supreme Court very recently has ruled that speech/press prohibited by a Wash. D.C. statute that

offends the dignity of embassies was unconstitutional and overturned a majority opinion rendered by Judge Bork in the D.C. Cir. Boos v. Barry, 108 S.Ct. 1151, 99 L.Ed 2d 333, Daily Journal D.A.R. 3714, 1717 (24 March 1988). This defendant was obviously doing what the constituion forbids federal agents from doing, as indicated by recent court decisions.

This defendant also relies on the disputed fact that;

"According to plaintiff, he filed a request under the Freedom of Information Act (FOIA) for documents relating to the August 16, 1983 interview. He received such documents on November 5-6, 1983" (Page -2- of defendants Statement of Uncontroverted Facts and Conclusions of Law, lines 3-6.) If that fact were true then the discovery of substantial evidence more than 4 years prior to the filing of plaintiff's last complaint on Dec 23, 1987 would be adequate grounds for a dismissal of this action. However as indicated in the attached Exhibit "A" plaintiff was sent his F.B.I. containing the obvious incriminating evidence on Jan 3, 1985 which is the date indicated on the F.B.I. cover letter containing the materials. As indicated in support of his allegations against this defendant.

This defendant also states that the allegations made against him in the last complaint, (at lines 5-6, P-6- Statement of Uncontroverted Facts and Conclusions of Law) are that he and Agent Schneider "allegedly warned plaintiff about violating U.S.C.S. 112(b)." However Exhibit "A" at page 3 carries the clear indication that (at Para. 3)

> "Mr. Gerritsen was told that if he desired to demonstrate against the Mexican Government in accordance with his First Amendment rights, he must do so within the constraints of the PFO statute, which explicitly restricts demonstrations to at least 100 feet from the structure housing the consulate."

That above statement to Gerritsen is a misstatement of the above law and if this defendant is willing to stipulate that the above quote is an accurace report of what transpired, then this plaintiff requests that this court consider this pleading as a Motion of Summary Judgment against this defendant, and grant that motion as their is no substantial issue of fact other than those already discussed above and that as a matter of law plaintiff is entitled to judgment against this defendant, as he clearly enforced on this plaintiff non existant prohabitions against "demonstrations" and other First Amendment activity within 100 feet of the Mexican Consulate in Los Angeles, that ought to be protected by this Court.

Date: 4 May 1988 Respectfully submitted

Jack Gerritsen Plaintiff

U.S. Department of Justice

Federal Bureau of Investigation

Washington, D.C. 20535
JAN 3 1985
Subject of Request: Jack Gerritsen
FOIPA No. 248,556/190-

***

TO: DIRECTOR, FBI

FROM: SAC, LOS ANGELES (185-NEW) (IT-1) (P)

***

PROTECTION OF FOREIGN NATIONALS

On August 16, 1983, Mr. Jack Gerritsen, 513 South Atlantic, #567, Monterey Park, California 91754, after being apprised of the identities of interviewing Agents of the Federal Bureau of Investigation, Los Angeles, was interviewed regarding Mr. Gerritsen's interference with the normal functions of the Mexican Consulate located at 125 Paseo de la Plaza, Los Angeles, California.

Mr. Gerritsen was advised of the Protection of Foreign Officials Statute, specifically the aspect concerned with the interference or disruption of Consular activities.

Mr. Gerritsen was told that if he desired to demonstrate against the Mexican Government in accordance with his First Amendment rights, he must do

so within the constraints of the PFO Statute, which explicitly restricts demonstrations to at least 100 feet from the structure housing the Consulate.

The following descriptive information on Jack Gerritsen was obtained from his California driver's license #K0605744:

Date of Birth	May 9, 1936
Height	6'
Weight	205 pounds
Eyes	Blue
Hair	Brown
Other Address	1948 Wilcox Avenue Monterey Park, California

[blacked out by F.B.I.] Mr. Gerritsen [blacked out by F.B.I.] to the F.B.I.

***

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACK GERRITSEN,	)	No. 86-5726
	)	D.C. No.
Plaintiff,	)	85-5020-PAR
	)	
v.	)	OPINION
	)	
MIGUEL DE LA MADRID HURTADO, etc., et al.,	)	
	)	
Defendants.	)	
	)	Filed June 18, 1987

Before: Harry Pregerson and William A. Norris, Circuit Judges, and Edward C. Reed, Jr.,*

Appeal from the United States District Court for the Central District of California
Pamela Ann Rymer, District Judge, Presiding

Opinion by Judge Pregerson

Jack Gerritsen, alleging various torts and civil rights violations, filed a complaint pro se against the President of Mexico, the Mexican Consulate, and several consular officials and employees associated with the

* Honorable Edward C. Reed, Jr., United States District Judge, District of Nevada, sitting by designation.

Mexican Consulate in Los Angeles. The Mexican government filed a motion to dismiss the complaint for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim. The district court dismissed the complaint against all of the defendants for lack of subject matter jurisdiction. Gerritsen appeals the district court's order dismissing the complaint. We reverse.

We hold that the district court has subject matter jurisdiction over the claims against the two consuls general, the vice consul, and the Mexican Consulate. We further hold that Gerritsen must be allowed to amend his complaint, if he wishes, to gain jurisdiction over the other defendants as well.

BACKGROUND

Gerritsen filed a complaint pro se in which he alleged various wrongful acts by the Mexican government and its employees. There has been no proof at this state of the proceedings that the acts alleged in Gerritsen's complaint occurred. In reviewing a dismissal for lack of subject matter jurisdiction, we are required to assume that the allegations in the complaint are true. *See Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974) (dismissal for lack of subject matter jurisdiction and failure to state a claim); *Western Reserve Oil & Gas Co. v. New*, 765 F.2d 1428, 1430 (9th Cir. 1985)(dismissal for failure to state a claim), *cert. denied*, _____ U.S. _____, 106 S.Ct. 795, 88 L.Ed.2d 773 (1986).

The complaint alleges that on several occasions,

when Gerritsen was distributing leaflets critical of the Mexican government in front the Mexican Consulate in Los Angeles, consulate staff acted in various unlawful ways to stop him from distributing the leaflets. The staff's alleged acts included striking Gerritsen with a heavy metal object, threatening with a club and with a gun, kidnapping and interrogating him, and forcibly taking his leaflets and camera. Gerritsen also alleges that the consulate staff on one occasion asked the Los Angeles Police to arrest him.

The complaint alleges jurisdiction under 28 U.S.C. § 1343.[1] It names as defendants the president of Mexico, the Mexican Consulate, two consuls general of Mexico, a vice consul of Mexico, an administrative assistant at the Mexican Consulate in Los Angeles, and unidentified employees of the Mexican government. The Mexican government itself is not a party. However, the motion to dismiss below and the appellate brief filed on behalf of these defendants were filed by the Mexican government pro se.

In its sua sponte order dismissing the complaint, the district court held that the Mexican government could not represent the defendants pro se, that there is no

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[1] 28 U.S.C. § 1343(a) reads in part:

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation under color of State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

personal jurisdiction over the president of Mexico, and that there is no subject matter jurisdiction under 28 U.S.C. § 1343 because of the absence of state action.[2] Gerritsen appeals only the third holding.[3]

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[2] We take the court's use of "state action" to mean under color of state law, which is a requirement for jurisdiction under 28 U.S.C. § 1343 and an element of a claim for relief under 42 U.S.C. § 1983.

[3] The Justice Department, through the U.S. Attorney for the Central District of California, recommended that we allow an official of the Mexican Consulate in Los Angeles to argue on behalf of the defendants pro hac vice. We allowed this argument to aid the court in the decisional process. We did not disturb the district court's ruling, which was not appealed, denying the Mexican government pro se status.

The U.S. Attorney's office argued that the Mexican consul had a right to appear at oral argument pursuant to the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. 6820, 596 U.N.T.S. 261 and the Consular Convention, August 12, 1942, United States-Mexico, 57 Stat. 800 T.S. No. 985. We find these arguments unpersuasive. The United States government and the Mexican government point to Article 5 of the Vienna Convention as giving the consul the right to appear. Article 5 states in relevant part that "[c]onsular functions consist in: . . .(i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State." It is not consistent with the "practices and procedures obtaining in the receiving State" to have individuals who are neither parties nor attorneys admitted to practice before the federal courts to appear at oral argument. The United States government and the Mexican government also point to Article VI of the Consular Convention. Article VI states in relevant part that "[c]onsular officials of either High Contracting Party may, within their respective consular districts, address the authorities . . . for the purpose of protecting the nationals of the State by which they were appointed in the enjoyment of rights accruing by treaty or otherwise." The provision allowing consuls to "address the authorities" does not

DISCUSSION

I. Appealability

The district court's sua sponte order dismissing the complaint concludes with the following language: "Accordingly, for the reasons stated above, President de la Madrid is dismissed from this action with prejudice; plaintiff's complaint is dismissed for lack of subject matter jurisdiction."

Ordinarily an order dismissing the complaint rather than dismissing the action is not a final order and thus not appealable. However, "[i]f it appears that the district court intended the dismissal to dispose of the action, it may be considered final and appealable." *Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1171 n. 1 (9th Cir. 1984).

The order did not grant Gerritsen leave to amend the complaint. Failure to allow leave to amend supports an inference that the district court intended to make the

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appointed in the enjoyment of rights accruing by treaty or otherwise." The provision allowing consuls to "address the authorities" does not provide foreign consuls license to appear in court in contravention of the rules of court in the receiving state. We have previously held that these two treaties do not give consuls the right to appear in court on behalf of Mexican citizens. *DuPree v. United States*, 559 F.2d 1151, 1154-1155 (9th Cir. 1977)

Although the consul had no right to appear at oral argument, we feel that it was a proper exercise of our discretion to grant the consul amicus status. In doing so, we availed ourselves of the benefit of the consul's thorough and erudite legal arguments, and promoted comity. We have this discretion under Fed. R. App. P. 2.

1110, 1112 (9th Cir. 1975. Furthermore, the court's intention of finality is evinced by its apparent conclusion that amendment of the complaint could not save the action. *See Scanlon v. Atascadero State Hosp.*, 677 F.2d 1271, 1272 (9th Cir. 1982), *vacated on other grounds*, 465 U.S. 1095, 104 S. Ct. 1583, 80 L.Ed.2d 117 (1984). The district court dismissed the complaint because of the absence of state action (i.e., conduct under color of state law required by 28 U.S.C. § 1343(a)(3)). In doing so, the district court noted that "[t]he alleged unconstitutional actions taken against plaintiff were *all* taken by members of the Mexican consulate or officials of the Mexican government," and that acts by the Mexican government, including the Mexican Consulate, cannot constitute conduct under color of state law. The complaint, therefore, could not be amended to allege that the defendants' conduct was under color of state law as required by section 1343(a)(3).

Because the complaint could not properly have been amended to allege state action, it is clear that the district court intended its order dismissing the complaint to dispose of the action. Thus, we hold that the order ins final and appealable.

II. Subject Matter Jurisdiction

Whether subject matter jurisdiction exists is a question of law reviewable de novo. *Peter Starr Prod. Co. v. Twin Continental Films, Inc.*, 783 F.2d 1440, 1442 (9th Cir. 1986).

The only statutory provision under which the complaint asserted subject matter jurisdiction is 28 U.S.C.

complaint asserted subject matter jurisdiction is 28 U.S.C. § 1343 (granting subject matter jurisdiction over certain actions seeking protection of civil rights and elective franchise). The district court considered no other ground for subject matter jurisdiction. However, in determining the existence of subject matter jurisdiction, we are not limited to the jurisdictional statutes identified in the complaint. "[T]he court may sustain jurisdiction when an examination of the entire complaint reveals a proper basis for assuming jurisdiction other than one that has been improperly asserted . . ." 5 C. Wright & A. Miller, Federal Practice and Procedure § 1206 (1969); *see Williams v. United States*, 405 F.2d 951, 954 (9th Cir. 1969)("If facts giving the court jurisdiction are set forth in the complaint, the provision conferring jurisdiction need not be specifically pleaded."). Therefore, we will consider jurisdiction under 28 U.S.C. § 1351 (granting subject matter jurisdiction over civil actions against consuls, vice consuls, and members of a diplomatic mission) and 28 U.S.C. § 1330 (granting subject matter jurisdiction over certain actions against foreign states) as well as jurisdiction under 28 U.S.C. § 1343.

A. Jurisdiction Under 28 U.S.C. § 1351

28 U.S.C. § 1351 provides: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of all civil actions and proceedings against--(1) consuls or vice consuls of foreign states . . ." By virtue of this statute the federal courts may exercise jurisdiction over the two consuls general and one vice consul who are

defendants in this action.[4]

Jurisdiction, however, may be limited by treaty. *See Whitney v. Robertson*, 124 U.S. 190, 194, 8 S.Ct. 456, 458, 31 L.Ed. 386 (1888) ("By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation"). To determine the power of the district court to exercise jurisdiction over the defendants in this case, we must examine the provisions of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. 6820, 596 U.N.T.S. 261. *See Silva v. Superior Court*, 52 Cal. App.3d 269, 275-278, 125 Cal.Rptr. 78, 82-84 (1975). The Vienna Convention is the most recent and most authoritative treaty binding on both Mexico and the United States that deals with consular relations and consular immunity.[5]

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[4] The complaint does not allege that all of the defendants are aliens. Such allegations, however, would confer diversity jurisdiction under 28 U.S.C. § 1332. If indeed all of the defendants are aliens, Gerritsen must be permitted to amend his complaint accordingly. *See* 28 U.S.C. § 1653; 3 J.Moore, *Moore's Federal Practice* ¶¶ 15.09, 15.11 (1985).

[5] Two other treaties in force between Mexico and the United States govern the immunity of consular officials and staff. The first is the Pan American Consular Convention, February 20, 1928, 47 Stat. 1976, T.S. No. 843, 155 L.N.T.S. 291. It states in Articles 15, 16, and 17 that "[c]onsular agents shall be subject to the jurisdiction of the courts in civil cases," that "[c]onsuls are not subject to local jurisdiction for acts done in their official character and within the scope of their authority," and that "[i]n respect to unofficial acts, consuls are subject, in civil as well as in criminal matters, to the jurisdiction of the state where they exercise their functions."

Article 43 of the Vienna Convention provides as follows: "Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect to acts performed in the exercise of consular functions." 21 U.S.T. at 104. Jurisdiction can be gained over consular officers and employees, therefore, only with respect to acts that do not constitute "consular functions." The term "consular functions" is defined in Article 5 of the Vienna Convention. Only two sections of Article 5 are relevant to the present case:

> Consular functions consist in: (a) protecting in the receiving State the interest of the sending State and of its nationals, both individuals and bodies corporate, *within the limits permitted by international law*; . . . (m) performing any other

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The second is the Consular Convention, August 12, 1942, United States-Mexico, 57 Stat. 800, T.S. No. 985. It states in Article II that "[i]n civil, contentious-administrative and labor cases, consular officers shall be subject to the jurisdiction of the courts of the State which receives them," and that "[a] consular officer shall not be required to testify in . . . civil cases regarding acts performed by him in his official capacity."

These provisions are virtually identical to the provisions of the Vienna Convention. Moreover, the Vienna Convention, which is by far the most detailed and explicit of the three treaties, was adopted with the intention of advancing codification of international law. 115 Cong. Rec. 30,953 (1969); *see United States v. Chindawangse*, 771 F.2d 840, 844 n. 10 (4th Cir. 1985)(The Vienna Convention "codifies international law on consular relations.") *cert. denied*, ____ U.S. ____, 106 S.Ct. 859, 88 L.Ed.2d 898 (1986). Therefore, our discussion will focus solely on the Vienna Convention.

> functions entrusted to a consular post by the sending State which are *not prohibited by the laws and regulations of the receiving State* or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State.

21 U.S.T. at 82-85 (emphasis added).

There appears to be no authority interpreting the vague term "within the limits permitted by international law" in Article 5(a) of the Vienna Convention. It would appear, however, that the treaty does not include interference with the internal affairs of the receiving state within the scope of consular functions. *See* Vienna Convention, Article 55(1), 21 U.S.T. at 113 (consular officials protected by the treaty "have a duty not to interfere in the internal affairs of that (receiving) State").

Parallel provisions in the Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, T.I.A.S. 7502, 500 U.N.T.S. 95, support this reading of the treaty. Article 3(1)(b) of the Vienna Convention on Diplomatic Relations contains wording that is quite similar to the provisions in question. It states that "[t]he functions of a diplomatic mission consist *inter alia* in: . . . (b) protecting in the receiving State the interests of the sending State and of its nationals, *within the limits permitted by international law*." 23 U.S.T. at 3231-32 (emphasis added). According to one authority, "[t]his means that [diplomatic representatives] are forbidden to interfere in the internal affairs of the state to which they

are accredited." B. Jankovic, *Public International Law*, 255 (1984).

Wrongful acts committed by an official or employee of a Mexican consulate within the United States to suppress criticism of Mexico within this country constitute an interference with the United States' internal affairs because these acts impair the citizenry's ability to promote self-government through robust discourse concerning issues of public import. Therefore, the acts of the two consuls general and the vice consul alleged in the complaint are not "within the limits permitted by international law" and thus are not consular functions as defined in Article 5(a).

Similarly, many of the consular officials' and employees' acts alleged in the complaint are not consular functions under Article 5(m). Assault with a deadly weapon and kidnapping, for instance, are not consistent with penal laws applicable in the United States. These acts are, therefore, "prohibited by the laws and regulations of the receiving State," and thus cannot constitute consular functions under Article 5(a).[6]

Because the acts alleged in the complaint are not consular functions under Article 5 of the Vienna Convention, these acts are not protected by consular

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[6] Similarly, the *Restatement (Second) of Foreign Relations Law of the United States* describes this exclusion as follows: "The scope of official functions . . . may be determined in part by the law of the receiving state. For example, the receiving state can forbid propaganda activities and travel in restricted areas." *Id.*, § 73 comment b (1965); *see* § 81 comment b.

immunity. *See Heaney v. Government of Spain*, 445 F.2d 501, 505 (2d Cir. 1971).[7] Thus, the Vienna Convention does not preclude the exercise of jurisdiction under 28 U.S.C. § 1351 over the two defendant consuls general and the vice consul.

B. Jurisdiction Under the Foreign Sovereign Immunities Act

28 U.S.C. § 1330(a), referring to the provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-11, provides as follows:

> The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a *foreign state* as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the *foreign state* is not entitled to immunity either under section 1605–1607 of this title or under any applicable international agreement.

(Emphasis added.) The defendant Mexican Consulate falls within the definition of a foreign state because it is a "separate legal person" that is "an organ of a foreign state or political subdivision thereof" and that is "neither a

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[7] *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 310 n. 27 (2d Cir. 1981) *cert. denied*, 454 U.S. 1148, 102 S.Ct. 1012, 71 L.Ed.2d 301 (1982) , notes that dicta in *Heaney* relating to a wholly separate issue was superseded by 28 U.S.C. § 1603(d).

citizen of a state of the United States . . . nor created under the laws of a third country." 28 U.S.C. § 1603(b). *Cf. Gray v. Permanent mission of the People's Republic of the Congo to the United Nations*, 443 F.Supp. 816, 819 (S.D.N.Y. 1978)(Congo Mission is a foreign state under 28 U.S.C. § 1603, *aff d*, 580 F.2d 1044 (2d Cir. 1978). Thus, the Foreign Sovereign Immunities Act governs the exercise of jurisdiction over the Mexican Consulate.

The Act limits the extent of sovereign immunity enjoyed by foreign states. One of the enumerated exception to foreign sovereigns immunity relates to actions

> in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the *tortious act or omission* of that foreign state or any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to--
>
> (A) any claim based upon the exercise or performance or the failure to exercise or perform a *discretionary function* regardless of whether the discretion be used.

28 U.S.C. § 1605(a)(5) (emphasis added). The present action falls within this exception because the plaintiff Gerritsen seeks damages for injury and loss of property in this country resulting from alleged tortious acts by the Mexican Consulate and by its officials and

employees.

Moreover, the acts of the Mexican Consulate of which Gerritsen complains are not part of the exercise of a "discretionary function." We previously held that the Act maintains foreign sovereign immunity for torts committed in the exercise of a discretionary function in order to allow foreign states to be unfettered in their policy making. Accordingly, in determining what is a discretionary function,

> [t]his circuit employs a test which distinguishes between the "planning level" of governmental activity and those acts designed to carry out policy, the "operational level." Because decisions at the planning level establish governmental policy, they are not actionable. But where decisions occur at the operational level, the discretionary function exemption provides no protection from liability even though such decisions or acts may involve elements of discretion.

Olsen v. Government of Mexico, 729 F.2d 641, 647 (9th Cir.) (citations omitted), *cert. denied*, 469 U.S. 917, 105 S.Ct. 295, 83 L.Ed.2d 230 (1984). Many of the acts alleged in the complaint to have been committed on behalf of the Mexican Consulate, including assault with a deadly weapon and kidnapping, are not decisions to "establish governmental policy," or decisions at the "planning level," but rather, at best, are acts to "carry out policy," or acts at the "operational level." Therefore, the alleged acts attributed to the Mexican Consulate fall

within the exception to foreign sovereign immunity described in 28 U.S.C. § 1605(a)(5)(the tortious act or omission exception). Thus, under section 1605(a)(5), federal subject matter jurisdiction exists over the claims against the Mexican Consulate based on the wrongful acts alleged in the complaint.

C. Jurisdiction Under 28 U.S.C. § 1343

28 U.S.C. § 1343 is the basis of district court jurisdiction alleged in the complaint. The district court found that jurisdiction could not lie under section 1343 because of the absence of state action. Clearly, as the district court recognized, "state action" or acts "under color of state law" refer to acts attributable to states of the United States. The Supreme Court impliedly so held when it concluded from the legislative history that for purposes of 42 U.S.C. § 1983--a civil rights statute requiring state action--even the District of Columbia does not qualify as a state. *District of Columbia v. Carter*, 409 U.S. 418, 424-33, 93 S.Ct. 602, 606-10, 34 L.Ed.2d 613 (1973), *superseded by* 93 Stat. 1284 (1979) 42 U.S.C. § 1983 was amended to include the District of Columbia, so that the section now reads "under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia . . ."). Therefore, the acts performed by the defendants, all of whom are officials, instrumentalities, or employees of the Mexican government, could not constitute acts under color of state law for purposes of section 1343.

Gerritsen argues that state action or conduct under color of state law is not needed for jurisdiction invoked under 28 U.S.C. § 1343(a)(1) and (2) for acts in violation

of 42 U.S.C. § 1985(3). This is true. *Gillespie v. Civiletti*, 629 F.2d 637, 641 (9th Cir. 1980). Nevertheless, there is no jurisdiction under 28 U.S.C. § 1343(a)(1) or (2) because Gerritsen's complaint does not state a claim under 42 U.S.C. § 1985(3).

28 U.S.C. § 1343 states in relevant part:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (1) To recover damages for injury to his person or property, or because of deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;
>
> (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent . . .

28 U.S.C. § 1343(a). The only subsection of 42 U.S.C. § 1985 that could possibly apply to the facts of the present case states in relevant part that a cause of action will lie

> [i]f two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of

> equal privileges and immunities under the laws.

42 U.S.C. § 1985(3).

The Supreme Court has made it clear that 42 U.S.C. § 1985(3) is not to be construed as a general federal tort law. "The language requiring intent to deprive *of equal protection*, or *equal* privileges and immunities, means that there must be some racial or perhaps other-wise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S.Ct. 1790, 1798, 29 L.Ed.2d 338 (1971) (emphasis in original).

Gerritsen has not alleged in his complaint any class-based discrimination against him. As a result, he has not stated a claim under section 1985(3). *Scott v. Rosenberg*, 702 F.2d 1263, 1269-70 (9th Cir. 1983), *cert. denied*, 465 U.S. 1078, 104 S.Ct. 1439, 79 L.Ed.2d 760 (1984). Therefore, there is no jurisdiction under 28 U.S.C. § 1343(a)(1) or (2) for his claims.

Gerritsen argues on appeal, but did not allege in his complaint, that "he is one of those class of persons who are critical of the policies of the Mexican government," and that he "is a member of a class of persons who would distribute printed materials in public areas of the City of Los Angeles." Because this purported class formulation has been raised by Gerritsen in his briefs only and has not been alleged in his complaint, we need not decide now whether this class can give rise to a claim under section 1985(3). We do note, however, that we have previously held that to state a

claim under section 1985(3) the plaintiff must be a member of a class that requires special federal assistance in protecting its civil rights. *Schultz v. Sundberg*, 759 F.2d 714, 718 (9th Cir. 1985). *But see Keating v. Carey*, 706 F.2d 377, 386-87 (2d Cir. 1983)(Republicans are a protected class under section 1985(3); *Glasson v. City of Louisville*, 518 F.2d 899, 912 (6th Cir.)(anti-government protestors are a protected class under § 1985(3), *cert. denied*, 423 U.S. 930, 96 S.Ct. 280, 46 L.Ed.2d 258 (1975).

CONCLUSION

The district court had jurisdiction under 28 U.S.C. § 1351 over the claims against the two consuls general and the vice consul. The Vienna Convention on Consular Relations does not grant these defendants immunity with respect to the claims alleged. The district court also had jurisdiction under the Federal Sovereign Immunity Act over the claims against the defendant Mexican Consulate. Therefore, we reverse the order dismissing the claims against the two consuls general, the vice consul, and the Mexican Consulate. We remand the action for appropriate further proceedings consistent with the view herein expressed, including the filing of amended pleadings.

REVERSED and REMANDED.

United States Constitution

Article III, Section 2(2):

> "In all cases affecting Ambassadors, other public Ministries and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction."

The First Amendment to the United States Constitution provides in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press."

The Fourteenth Amendment to the United States Constitution, section 1, provides in part:

> "No state shall . . . deprive any person of life, liberty, or property without due process of law . . ."

Statutory Provisions

28 U.S.C.S. § 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title [28 USCS § 1603(a)] as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title [28 USCS §§ 1605-1607] or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title [28 USCS § 1608].

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title [28 USCS §§ 1605-1607].

28 U.S.C.S. § 1351. Consuls and vice consuls as defendants

The district courts shall have original jurisdiction, exclusive of the courts of the states, of all actions and proceedings against consuls or vice consuls of foreign states.

28 U.S.C.S. § 1608. Service; time to answer; default

(a) Service in courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangements exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the

> foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services--and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

> (1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or
>
> (2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable

international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state--

(A) as directed by an authority of the foreign state or political subdivision in respoone to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made--

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

42 U.S.C.S. § 1983. Civil Action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.